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No. _____

In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether institutional bias caused by prejudgment is an "extraordinary circumstance" rendering *Younger* abstention inappropriate without regard to the three-prong test of *Middlesex*.

2. Whether the sixth amendment right to counsel clause prohibits someone other than the client from waiving the attorney-client privilege arising in a criminal case.

3. Whether the unconstitutionality of a *sua sponte* adjudication of ineffective assistance of counsel in a criminal case in violation of *Strickland v. Washington* is raised by pleadings attacking the subsequent attorney disciplinary proceeding expressly triggered by that adjudication.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Earle A. Partington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Hawaii in the above-entitled proceeding. The opinion of the court of appeals is reported as *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), attached as Appendix A to this petition.[1]

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was originally entered on March 13, 1989, amended on April 6, 1989, and further amended on July 12, 1989. Timely petitions for rehearing by both sides and Partington's suggestion for rehearing *en banc* were denied by order filed December 22, 1989, which is attached as Appendix B to this petition. This Court has jurisdiction to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

This case raises issues involving the application of the first, fifth, sixth and fourteenth amendments to the Constitution of the United States.

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[1] Persons with an interest in this action include the Justices of the Supreme Court of Hawaii (Chief Justice Herman Lum, Associate Justices Frank Padgett, Yoshimi Hayashi, James Wakatsuki, and Retired Justice Edward Nakamura).

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Partington is a criminal defense attorney with over twenty years' experience who filed suit pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) for declaratory and injunctive relief alleging that subjecting him to a Hawaii Supreme Court Rule (HSCR) 13 disciplinary proceeding violated his first, fifth, sixth and fourteenth amendment rights. The district court abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and the court of appeals affirmed by a divided vote with three separate opinions. *Partington v. Gedan*, 880 F.2d at 116 (9th Cir. 1989) (Appendix A).

Partington had been appointed by a Hawaii trial court to represent Clifford M. M. Clarke, Sr., who was charged with the brutal murder of the child of his live-in girlfriend. After a heavily publicized trial which sparked public debate arising out of charges of negligence on the part of the Hawaii Department of Social Services, Clarke was convicted and sentenced to life in prison. Partington also represented Clarke on appeal and raised numerous

issues of court error and prosecutorial misconduct. During the pendency of the appeal, the trial judge filed a disciplinary complaint against Partington based on his waiver of closing argument at trial.[2] In response to this complaint, Partington filed a motion in the Hawaii Supreme Court requesting a temporary remand for a hearing on the trial judge's allegation of ineffectiveness. That motion was denied.

At oral argument on Clarke's appeal, one of the justices of the Hawaii Supreme Court accused Partington of deliberate misconduct as trial counsel. Although Clarke did not raise on appeal any ineffective assistance issue, the Hawaii Supreme Court reversed Clarke's conviction, *sua sponte* finding ineffective assistance of trial defense counsel (presumably for intentional misconduct) based on the following five acts or omissions: (1) Partington's refusal to make an opening statement, (2) his refusal to cross-examine the victim's mother without vital discovery, which was provided a few days later, (3) his refusal to call the mother as Clarke's witness after receiving the discovery, (4) his eliciting of testimony from prosecution witnesses of their belief that Clarke was guilty, as part of an effort to impeach them by showing bias, and (5) his waiver of closing argument. The Hawaii Supreme Court did not address any of the substantial issues asserted by Clarke as error. In its opinion, the Hawaii Supreme

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[2] The complaint was filed pursuant to HSCR 2, relating to ordinary attorney disciplinary proceedings, rather than pursuant to the extraordinary disciplinary proceedings of HSCR 13.

Court triggered proceedings pursuant to HSCR 13 ("Proceedings Following Final Adjudication of Ineffective Assistance of Counsel in Criminal Cases").[3]

HSCR 13[4] provides for disciplinary proceedings against defense counsel against whom a final adjudication of ineffective assistance of counsel has been made resulting in the reversal of a criminal conviction. HSCR 13 has no provision for any charge, written or otherwise, against counsel, but is triggered by the opinion reversing the conviction. Pursuant to a specified schedule, the Hawaii Supreme Court then appoints a special master "to determine whether action against the counsel alleged to have been incompetent [sic] is warranted." Upon the appointment of a special master, counsel must file an answer "showing cause why corrective action" should not be taken by the Supreme Court. The special master then appoints a special prosecutor, discovery may take place, and a hearing is held according to the specified schedule. No procedure is prescribed for the conduct of the hearing or the prehearing proceedings. The master may either dismiss the proceeding or make a recommendation for corrective action, which is subject to review by the Hawaii Supreme Court.

Respondents Gedan and Chang were duly appointed as special master and special prosecutor, respectively. In

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[3] The unpublished, but highly publicized, opinion of the court in *State v. Clarke*, No. 10041 (Haw. Sup. Ct. Dec. 27, 1985), is attached as Appendix C to this Petition.

[4] The full text of HSCR 13 is set forth at Appendix D and in note 1 of Appendix A to this Petition.

his "answer," Partington, without waiving any constitutional challenges, stated that the five acts or omissions specified by the Hawaii Supreme Court were intentional trial tactics, but he could not explain them because Clarke had invoked the attorney-client privilege. Gedan made no effort to comply with the HSCR 13 specified schedule, and shortly after the filing of this section 1983 action, the parties stipulated to stay the HSCR 13 proceeding.

In the district court, Partington moved for summary judgment. Gedan and Chang moved for dismissal, arguing that abstention was required because Partington's constitutional claims could be raised in the HSCR 13 proceeding. The Hawaii Association of Criminal Defense Lawyers filed a brief on behalf of Partington as *amicus curiae*. The district court denied Partington's motion for summary judgment and granted the motion to dismiss after applying the three-prong test for *Younger* abstention in attorney disciplinary proceedings laid down in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

The court of appeals took jurisdiction of Partington's timely appeal pursuant to 28 U.S.C. § 1291 and § 1292(a)(1). *Partington*, 880 F.2d at 120. Abstention was upheld under *Younger v. Harris* for two reasons. First, the majority opinion of the court of appeals held (without benefit of briefing or argument) that the Hawaii Supreme Court should rule on the issue of whether the Hawaii attorney-client privilege is a procedural bar to Partington's ability to defend his trial tactics at the HSCR 13 hearing.

Second, the majority held that Partington had not proven his claim of bias on the part of the special master

and the Hawaii Supreme Court, and therefore the three prongs of the *Middlesex* test were satisfied, thereby mandating *Younger* abstention.[5] The majority rejected Partington's argument that, under *Withrow v. Larkin*, 421 U.S. 35 (1975), the Hawaii Supreme Court was biased based upon its "final adjudication of ineffective assistance of counsel" in *State v. Clarke*. The majority concluded that Partington was not deprived of a competent tribunal because, based on a letter written by the Chief Justice to concerned members of the Hawaii defense bar, it appeared that the HSCR 13 hearing would provide *de novo* review of the Hawaii Supreme Court's "final adjudication" of ineffectiveness. The majority also held that judicial recusal was an adequate remedy for any judicial bias, including institutional bias caused by prejudgment.

In addition, refusing to reach the issue of whether the Hawaii Supreme Court's "final adjudication" of ineffectiveness against Partington violated his constitutional rights, the majority found that this issue was not clearly raised in the complaint or otherwise.[6] However, all three circuit judges agreed that Gedan and Chang should be sanctioned for filing a frivolous Federal Rules of Civil Procedure 38 motion for sanctions against Partington.

On August 11, 1989, after the decision of the court of appeals in this case, the Hawaii Supreme Court decided

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[5] The applicability of the first two prongs of the *Middlesex* test were not disputed in the trial court.

[6] In their Application for Extension of Time in Which to File Petition for Writ of Certiorari, filed in this Court, Gedan and Chang admitted that Partington had in fact raised this issue in his complaint. See note 18.

Matsuo v. State, 70 Haw. 573, 778 P.2d 332 (1989), in which it was held that where the record is void as to trial defense counsel's reasons for his tactical decisions at trial, the accused's burden "to demonstrate actual, not speculative prejudice" could not be carried. Without giving trial defense counsel "the opportunity to explain," held the court, any ineffectiveness determination would be "premature." The court concluded that it would be "unfair" to subject trial defense counsel to proceedings under HSCR 13, "without first giving him an opportunity to explain his side of the story." 70 Haw. at 578, 778 P.2d at 335. In November, 1989, the Hawaii Supreme Court amended Hawaii Rules of Penal Procedure (HRPP) 40(f) to provide that in every postconviction proceeding where the ineffectiveness of trial defense counsel is alleged, the attorney accused of ineffectiveness shall be given notice of the proceedings and an opportunity to be heard. On February 21, 1990, the instant case was remanded to the district court for determination of the amount of sanctions, and further proceedings are pending.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

All three questions presented involve significant policy issues relating to *Younger* abstention and the sixth amendment right to counsel clause. Certiorari should be granted pursuant to Supreme Court Rule 17.1(c) because the court of appeals decided, or refused to decide, important questions of federal law which have not been, but should be, settled by this Court. The court of appeals also decided the first issue discussed below in conflict with

applicable decisions of this Court. Moreover, certiorari should be granted pursuant to Rule 17.1(a) because, as to the second issue discussed below, the court of appeals, by *sua sponte* deciding an issue without benefit of briefing or argument, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. THE HAWAII SUPREME COURT'S PREJUDGMENT IN *STATE v. CLARKE* CREATED INSTITUTIONAL BIAS, WHICH IS AN EXTRAORDINARY CIRCUMSTANCE RENDERING ABSTENTION INAPPROPRIATE.

The court of appeals incorrectly applied the *Middlesex* test for *Younger* abstention by holding that bias is a factor to be considered as part of the third prong of the *Middlesex* test relating to the ability to have one's constitutional claims "timely decided by a competent state tribunal." *Partington*, 880 F.2d at 123. Rather, as stated by the dissent (*id.* at 135-36), the court of appeals should have held that institutional bias due to prejudgment is an "extraordinary circumstance" rendering abstention inappropriate under *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), and *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n.4 (1975).

The majority concluded that *Gibson* "analyzed incompetence caused by bias" as part of what became the third prong of the *Middlesex* test. 880 F.2d at 125, n.3. The majority recognized that in *Kugler* this Court categorized "the biased tribunal finding in *Gibson* as an 'extraordinary circumstance' " which would make abstention inappropriate regardless of whether the three-prong test is

met. However, the majority rejected this language in *Kugler* as dictum. *Id.* at 126, n.3.

Applying *Kugler*, the dissent reasoned that "[b]ias plays no role in the application of the three-part test[,]" but rather, bias is an extraordinary circumstance rendering abstention "inapplicable, regardless of whether the three-part test is met." *Id.* at 135. For the dissent, once bias is established as to *any aspect* of a case, abstention is inappropriate, whereas the majority analyzed bias in terms of the aspect of the case to which the bias applies.

This case presents an opportunity for this Court to accept or reject the majority's interpretation of the relevant language in *Kugler*. If the court of appeals' interpretation of *Gibson* is correct, then abstention has been extended further than ever before by any court. Such an extension of the abstention doctrine results in significant and widespread prejudice to litigants seeking to enforce their federal constitutional rights in federal court.

The effect of the majority holding is to nullify the "logical inconsistency" test from *Withrow v. Larkin*,[7] in

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[7] In *Withrow*, it was held that:

> [J]ust as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. . . .

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every case where the state tribunal has avoided passing upon the issue of bias by refusing an opportunity to be heard. The majority held that this test is irrelevant in such a situation. *Partington*, 880 F.2d at 126.[8] This result leads to the following anomaly.

The effect of the majority opinion is to put state tribunals on notice that they can temporarily or even permanently block access to the federal courts by denying the aggrieved party a hearing (as the Supreme Court of Hawaii did to Partington in *State v. Clarke*). If the state tribunal acts *less* outrageously and only denies the aggrieved party a *fair* hearing, immediate access to the federal courts is permitted. A rule of abstention that encourages the denial of an opportunity to be heard in state tribunals is bad policy. Further, such a rule encourages state tribunals to refuse to address issues thereby directly contradicting one of the primary policy considerations underlying the abstention doctrine: respect for the ability of state tribunals to resolve federal constitutional

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> . . . Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. [421 U.S. at 58.]

[8] The majority's erroneous conclusion that bias was not proven because judicial recusal was an option for the Hawaii Supreme Court and because it could be assumed that the Rule 13 proceedings provided *de novo* review of the initial "final adjudication" is discussed in argument 3, below.

issues and encouragement of the resolution of such issues in state tribunals.[9]

This case demonstrates how damaging this rule is to the independence of the criminal defense bar. The attorney-client privilege prevents an attorney such as Partington from defending himself, after the fact, on the merits of a "final adjudication" of misconduct. Here, the Hawaii Supreme Court can entirely avoid addressing Partington's constitutional claims by dismissing the HSCR 13 proceeding.[10] Such a dismissal leaves Partington's reputation in shambles by virtue of the still extant original "final adjudication"[11] of ineffectiveness and leaves him with no remedy.[12] Further, Partington will

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[9] *Kugler*, 421 U.S. at 124; *Gibson*, 411 U.S. at 573-74; *Younger*, 401 U.S. at 43-44.

[10] Note that a dismissal on the ground that inquiry into Partington's conduct is barred by the sixth amendment would amount to a determination that he never should have been adjudicated ineffective in the first place.

[11] The majority opinion claims that Partington seeks to have this Court establish the rule that there must be a "predeprivation" hearing before any defense attorney can be adjudicated ineffective. Partington does not seek such a broad rule (although the Hawaii Supreme Court seems to have adopted such a rule in *Matsuo v. State*), but he does claim that such a rule is required wherever the allegation of ineffectiveness is made by someone other than the client. Where the client claims ineffectiveness, the attorney-client relationship is finished. Where someone other than the client makes such an allegation, the existing attorney-client relationship can be seriously impaired in violation of the sixth amendment.

[12] One example of the irreversible damage that can be done to counsel is presented by the requirement of the California Business and Professions Code § 6068(n)(7) (West 1989

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have had to defend against a "final adjudication" of ineffectiveness, a "final adjudication" against which the sixth amendment bars him from defending and which should not have been made at all because of the sixth amendment presumption of effectiveness and right to independence of defense counsel. *Strickland v. Washington*, 466 U.S. 668, 688-93, *reh'g denied*, 457 U.S. 1267 (1984).

The question inevitably follows whether Partington will have any incentive to carry out his duty of undivided loyalty to his future clients if the Hawaii courts are given immunity by the federal courts from the protection of the sixth amendment. The refusal of federal courts to provide relief in situations such as *State v. Clarke* will have a chilling effect on the willingness of competent and ethical counsel to take risks in the defense of criminal cases or even to accept appointments for the defense of the indigent.[13] Thus, the issue of how bias is analyzed and where

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Supp.) that any "[r]eversal of judgment in any proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney" be reported to the State Bar of California. The dismissal of an HSCR 13 proceeding would not obviate this requirement. Partington is a member of the California bar.

[13] In *Caplin & Drysdale Chartered v. Monsanto*, 109 S. Ct. 2667, 2674 (1989) (Blackmun, J., dissenting), it was noted that "[t]here is a place in our system of criminal justice for the maverick and the risk-taker, for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for nonconfrontational styles of advocacy might influence the judge's appointment decisions." Indigents in particular will be left to the appointment of only those counsel who are willing to conform out of fear of what happened to Partington.

bias lies in the *Middlesex* abstention analysis raises substantial constitutional questions with broad policy implications.

2. PARTINGTON'S INABILITY TO DEFEND HIMSELF IS MANDATED BY THE SIXTH AMENDMENT RIGHT TO COUNSEL CLAUSE.

Partington argued below that he is unable to raise his federal constitutional claims or contest the "final adjudication" of ineffectiveness in either the HSCR 13 proceeding or the Hawaii Supreme Court because of Clarke's refusal to waive the attorney-client privilege. The majority in the court of appeals, *sua sponte* and without benefit of briefing or argument, assumed that Partington's argument meant that state law imposes a procedural bar preventing him from defending himself. Thus, the majority ruled that Partington must first give the Hawaii Supreme Court the opportunity to interpret "Hawaii's rule regarding the attorney-client privilege." *Partington*, 880 F.2d at 123-24.

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. *Fisher v. United States*, 425 U.S. 391, 403 (1976). Courts of appeals in several of the circuits have recognized that the attorney-client privilege of the criminal defendant is protected as an important part of the sixth amendment right

to counsel.[14] And it has been recognized that only the client can waive the privilege,[15] which is permanant.[16]

Thus, Clarke's refusal to waive the attorney-client privilege renders the application of state law irrelevant.[17] In holding that Partington may have a remedy in state court on state procedural grounds, the majority clearly erred, because the controlling attorney-client privilege here is the privilege enshrined in the sixth amendment right to counsel clause.[18]

This question is one of first impression for this Court. This Court should explicitly hold that the attorney-client privilege is a part of the right to counsel clause of the

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[14] *Continental Oil Co. v. United States*, 330 F.2d 347, 350, 9 A.L.R.3d 1413, 1415 (9th Cir. 1964); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983); Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 Pacific L.J. 437, 441-42 (1982).

[15] *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459-460 (N.D. Cal. 1978); *see Esposito v. United States*, 436 F.2d 603, 606 (9th Cir. 1970).

[16] *Admiral Insurance v. District Court of Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989).

[17] The sixth amendment right to counsel applies to the states through the fourteenth amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). No one disputes that the attorney-client privilege applies to the communications between attorney and client in *State v. Clarke*. The only issue is whether someone other than Clarke can waive the privilege.

[18] The majority *sub silentio* applied *Pullman* abstention to this case. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

sixth amendment and that no one other than the client has the right to waive the privilege.

If someone other than the client could waive the privilege over the client's objection, any prosecutor could accuse a criminal defense attorney of ineffectiveness and have him hauled before a disciplinary proceeding in order to force him to breach the privilege and reveal the secrets of the client. The sixth amendment does not permit such a substantial threat to (1) the sanctity of the attorney-client relationship, (2) the defendant's right to counsel's undivided loyalty,[19] and (3) the right of independence of defense counsel.

Thus, Partington should not be required to seek a ruling from the Hawaii courts on what is an irrelevant issue. There was no basis for abstention on this ground.

3. PARTINGTON'S CHALLENGE TO THE HSCR 13 PROCEEDING CONSTITUTED AN ATTACK ON THE UNCONSTITUTIONAL "FINAL ADJUDICATION" OF INEFFECTIVENESS BY THE HAWAII SUPREME COURT.

The majority refused to rule on the constitutionality of the Hawaii Supreme Court's "final adjudication" that Partington rendered ineffective assistance of counsel to Clarke, by holding that the issue had not been raised. *Partington*, 880 F.2d at 129-30.

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[19] *Von Moltke v. Gillies*, 332 U.S. 708, 726 (1948); *Ferri v. Ackerman*, 444 U.S. 193 (1979); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir.), *cert. denied*, 109 S. Ct. 260 (1988); *Fitzpatrick v. McCormack*, 869 F.2d 1247 (9th Cir. 1989).

First, Gedan and Chang admitted in pleadings to this Court that Partington had raised this issue in his complaint.[20] This admission that the issue was raised in Partington's complaint should be dispositive of the question of whether the issue was raised in the district court.[21]

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[20] In their Application for Extension of Time in Which to File Petition for Writ of Certiorari filed in this Court (No. A-628), Gedan and Chang stated that "Partington sued in Federal District Court *seeking to nullify the state court's order and the Rule 13 case.*" (Emphasis added.) The only state court order at issue at the time of the filing of the complaint was that portion of the *Clarke* opinion making a "final adjudication" that Partington was ineffective and triggering an HSCR 13 proceeding.

[21] Even without Gedan and Chang's admission, it is clear that the issue of the constitutionality of the "final adjudication" of ineffectiveness by the Hawaii Supreme Court in *State v. Clarke* was properly raised by Partington as follows:

> 1) in the Complaint, the Hawaii Supreme Court was alleged to have found him guilty of serious misconduct without a hearing or any opportunity to defend himself (see paragraph 18 and factual allegations at paragraphs 9-11; E.R. 4-6);
>
> 2) in the Complaint, a declaratory judgment that the HSCR 13 proceedings are unconstitutional was requested (E.R. 8);
>
> 3) in Partington's Memorandum In Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss Complaint in the district court, he argued that he has been harmed by the decision in *Clarke* as follows: both the decision of the Hawaii Supreme Court and the ongoing HSCR 13 proceedings have a chilling effect on his right to free speech, that the court's finding of ineffectiveness has harmed his good

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This case should be summarily reversed and remanded to the court of appeals based on this admission alone.

Second, the Hawaii Supreme Court has recognized the inseparability of the "final adjudication" in the criminal appeal from the HSCR proceeding itself. In *Matsuo v. State*, decided after the court of appeals' opinion below, the Hawaii Supreme Court held that:

> The troublesome aspect with this [ineffective assistance of counsel] issue, however, is that the record is void as to the reasons for trial counsel's decision against calling any of the five inmates as witnesses at Petitioner's trial. Trial counsel did not testify at the hearing for post-conviction relief. Only Petitioner testified.
>
> * * *
>
> Here, we believe that unless trial counsel is given the opportunity to explain his reasons for not calling any of the five inmates as witnesses at Petitioner's trial, any prejudice demonstrated by Petitioner is speculative at best. Any ineffective assistance of counsel determination, in turn, is premature. Under these circumstances, therefore, we find it unfair to implement a Rule 13 proceeding against trial counsel without first giving him an opportunity to explain his side of the story. [70 Haw. at 578, 778 P.2d at 335.]

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name, reputation and law practice, and that the court violated the sixth amendment presumption of effectiveness in finding him ineffective without considering the reasons for his trial tactics (E.R. 245, 246, 248-51, 254); and

4) in Partington's Opening Brief in the court of appeals (O.B. at 7, 16, 20-24).

This holding in *Matsuo* makes sense only when HSCR 13 proceedings are viewed as merely dispositive, the "final adjudication" of ineffectiveness having been made once and for all by the appellate court in the opinion reversing the criminal conviction. Thus, *Matsuo* contradicts the assumption of the majority that HSCR 13 proceedings are *de novo*, an assumption which provided the basis for the majority in its severing the HSCR 13 proceeding from the "final adjudication" of ineffectiveness.[22] In view of *Matsuo*, this Court should summarily vacate the judgment and remand this case to the court of appeals for reconsideration.

The majority's severing of the HSCR 13 proceeding from the triggering "final adjudication" of ineffectiveness raises significant policy questions because such a severing gives state courts the unbridled power to destroy the reputation and livelihood of a criminal defense attorney who displeases them without affording the attorney a remedy, whenever a court takes a dislike to an attorney or his trial tactics, no matter how ethical those tactics may be.[23]

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[22] In November, 1989, the Hawaii Supreme Court also amended HRPP 40(f), relating to hearings in postconviction relief proceedings, to add a paragraph requiring that trial defense counsel be given notice and a hearing whenever the issue of ineffective assistance at trial is raised in postconviction proceedings. Taken together, this amendment and *Matsuo* clearly indicate that the HSCR 13 proceeding itself does not provide *de novo* review of the "final adjudication" of ineffectiveness, thereby denying the defense attorney due process of law.

[23] The risk of putting the attorney "out of business without convicting . . . [him] of anything," is damage which is

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This severing also raises very serious constitutional questions regarding the right to counsel clause of the sixth amendment, because the Hawaii Supreme Court's "final adjudication" of ineffectiveness in *Clarke* violated Partington's sixth amendment rights to the presumption of effectiveness and the independence of defense counsel as articulated in *Strickland*, 466 U.S. at 688-93. The purpose of the presumption of effectiveness is to protect the defense attorney and the judicial system from groundless postconviction claims of ineffectiveness. The criminal defendant is not protected by the presumption of effectiveness, but rather the presumption protects others from a claim of ineffective assistance by the criminal defendant. Thus, the presumption is not a right of the criminal defendant. It may be invoked against a criminal defendant, as happens when the state invokes it to refute a claim of ineffective assistance. Likewise, the defense attorney may invoke it when someone other than the client accuses the defense attorney of rendering ineffective assistance of counsel.[24]

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"irreparable and 'great and immediate' " *Krahm v. Graham*, 461 F.2d 703, 707 (9th Cir. 1972).

[24] It is Partington's position that where the following four-prong test is met, the sixth amendment right to counsel forecloses any inquiry into the tactics of trial defense counsel, and a criminal defense attorney cannot be constitutionally subjected to a disciplinary proceeding for his tactics:

> (1) someone other than the client alleges that trial defense counsel has been ineffective;

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The purpose of the right to "constitutionally protected independence of counsel"[25] is to protect both the criminal defendant and the defense attorney from attacks on the criminal defendant's right to counsel. While this right of independence of counsel arises from the criminal defendant's right to counsel, it must be a right belonging to *both* the criminal defendant and the defense attorney. This is apparent from *Strickland*, where this Court spoke in terms of the "decisions" and "performance" of the defense attorney being constitutionally protected.[26] 466 U.S. at 688. Only the defense attorney will *always* be in a position to vindicate this right of independence of counsel for the very reason found in this case: where a court

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(2) the client invokes the attorney-client privilege;

(3) the record is void as to the reasons for counsel's challenged acts or omissions; and

(4) counsel's acts or omissions do not constitute ineffectiveness *per se*.

The record in this case shows that all four prongs of this test are met.

[25] *Strickland*, 466 U.S. at 689.

[26] The Hawaii Supreme Court recognized the presumption of effectiveness in *Matsuo* by holding that prejudice must be actual and on the record, and that without a hearing for trial defense counsel to explain tactical decisions, prejudice to the accused is speculative at best. However, in *Clarke*, rather than applying the presumption of effectiveness, the Hawaii Supreme Court indulged in a presumption of *in*effectivness, abrogating completely the presumption of effectiveness and the right of independence of trial defense counsel.

drives a wedge between attorney and client as the Hawaii Supreme Court (and the trial judge) did in *State v. Clarke*, only the attorney can vindicate this right.[27] As this case presents a circumstance where it is necessary for defense counsel to invoke these two aspects of the sixth amendment right to counsel, this Court should make explicit what *Strickland* provides implicitly: that these sixth amendment rights can be invoked by counsel.

By challenging the triggering "final adjudication" of the Hawaii Supreme Court, Partington is *not* challenging the judgment in *Clarke*. The judgment in that case, reversing Clarke's conviction, was correct, albeit for the wrong reasons. Partington asserted numerous legitimate reasons mandating reversal of Clarke's conviction, most of which involve the conduct of the trial prosecutor and trial judge, and Clarke had a right to have the issues he raised adjudicated.[28]

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[27] Inappropriate judicial involvement with the "unique attorney-client relationship" also raises sixth amendment concerns. *See United States v. Wagner*, 834 F.2d 1474 (9th Cir. 1987); *People v. Davis*, 114 Ill. App. 3d 537, 70 Ill. Dec. 363, 449 N.E.2d 237 (1983); *Smith v. Superior Court*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968).

[28] The majority held that the *Rooker-Feldman* doctrine was implicated here. 880 F.2d at 130. However, Partington is not attacking the judgment in *State v. Clarke*. Further, he lacks standing to attack the judgment and would be ethically foreclosed from attacking a judgment favorable to his own client. Therefore, the *Rooker-Feldman* doctrine has no application to this case. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Moreover, Partington was not a party to *State v. Clarke* and his request for a hearing on the matter at issue was denied.

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All of the proceedings in state and federal court concerning this case since the 1985 "final adjudication" of ineffectiveness in *State v. Clarke* arise directly from that "final adjudication." To artificially separate that "final adjudication" from the HSCR 13 proceeding promotes 1) the destruction of the attorney's reputation without just cause, 2) the destruction of the attorney-client relationship, and 3) harassment of defense counsel who use unconventional but ethical trial tactics or represent unpopular clients.

CONCLUSION

This case presents a classic example of why appellate courts should refrain from *sua sponte* raising and deciding issues not raised or argued by the parties, and how subsequent efforts to uphold an apparently expedient but erroneous ruling can snowball into a constitutional catastrophe. In addition, important questions are presented requiring clarification of rulings by this Court both in the abstention doctrine (under *Gibson* and *Kugler*) and the sixth amendment right to counsel as discussed in *Strickland*. Moreover, important policy questions are presented involving both the imposition of discipline on criminal

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Rooker-Feldman and related doctrines have no application when the federal litigant has never had a day in state court. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *rev'd on other grounds*, 477 U.S. 902 (1986); *Miller v. Washington State Bar Association*, 679 F.2d 1313, *reh'g denied*, 691 F.2d 430 (9th Cir. 1982).

defense attorneys for the successful and ethical representation of unpopular criminal defendants and the potential for interference with attorney-client relationships and the right to counsel. For all of the foregoing reasons, Partington respectfully asks this Honorable Court to grant this Petition and either summarily vacate the judgment or order briefing and argument on the merits.

Respectfully submitted,

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(808) 526-9500
Petitioner Pro se

March 22, 1990

APPENDIX A

Earle A. PARTINGTON,
Plaintiff-Appellant,

v.

Joseph M. GEDAN; Howard T. Chang,
Defendants-Appellees.

No. 87-2375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1988.

Decided March 13, 1989.

Motion to Correct Opinion Granted in
Part and Denied in Part
April 6, 1989.

As Amended April 6, 1989.

As Amended on Denial of Reconsideration
July 12, 1989.

Attorney who was made subject of disciplinary proceedings following reversal of client's conviction for ineffective assistance of counsel brought civil rights action against special master and special prosecutor. The United States District Court for the District of Hawaii, Alan Cooke Kay, J., held that abstention under *Younger* was appropriate, and attorney appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court properly abstained from hearing attorney's constitutional challenges to enforcement of Hawaii Supreme Court Rule against him, but (2) attorney's arguments against abstention were not so frivolous as to warrant award of costs and attorney fees under Federal Rule of Appellate Procedure.

Affirmed.

Noonan, Circuit Judge, concurred and filed opinion.

Reinhardt, Circuit Judge, concurred in part and dissented in part and filed opinion.

Earle A. Partington, Honolulu, Hawaii, for plaintiff-appellant.

Susan L. Gochros, Deputy Atty. Gen., Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before WALLACE, REINHARDT and NOONAN, Circuit Judges.

WALLACE, Circuit Judge:

Attorney Partington filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court, alleging that enforcement of Hawaii Supreme Court Rule 13 against him violated the first, fifth, sixth, and fourteenth amendments to the United States Constitution. He sought a declaratory judgment stating that Rule 13 violated these constitutional provisions and an injunction barring any further proceedings against him pursuant to Rule 13. The district court concluded that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (*Younger*), was appropriate because Partington could raise these constitutional challenges in the ongoing Rule 13 proceedings. We have jurisdiction and affirm.

I

The Hawaii trial court appointed Partington as trial counsel for Clarke. The State had charged Clarke with brutally murdering the three-year-old daughter of his live-in girlfriend. Partington represented Clarke at trial. Clarke was convicted of murder and sentenced to life in prison.

Partington's appointment as counsel for Clarke continued on appeal. Clarke raised numerous contentions, but did not allege ineffective assistance of trial counsel. During the pendency of the appeal, however, the state trial judge who presided at Clarke's trial complained to the Office of Disciplinary Counsel of the Hawaii Supreme Court about Partington's failure to make a closing argument at Clarke's trial. Following this complaint, Partington filed a motion with the Hawaii Supreme Court, on behalf of Clarke, requesting that the Supreme Court remand the appeal to the trial court to explore the trial judge's complaint. The motion was denied.

During oral argument before the Hawaii Supreme Court on Clarke's criminal appeal, some Justices *sua sponte* raised the issue of ineffective assistance of trial counsel. The Hawaii Supreme Court subsequently reversed Clarke's conviction. Without addressing the numerous arguments made in Clarke's brief, the court declared that Partington rendered ineffective assistance during trial. The court based this conclusion on the following: (1) Partington refused to make an opening statement; (2) he refused to cross-examine the mother of the victim ostensibly because the State did not make certain records concerning the witness available to him; (3) he

subsequently refused to call the mother after receiving the records; (4) he elicited testimony from two State witnesses that they believed Clarke was guilty; and (5) he refused to make a closing argument. The Hawaii Supreme Court's opinion concluded: "We remind both counsel of their obligations under [Hawaii Supreme Court Rule] 13 once a judgment on appeal has been issued by us in this case."

Hawaii Supreme Court Rule 13[1] outlines proceedings that are to be brought against defense counsel following

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[1] Haw.St.Ct.R. 13 provides:

PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

> Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.
>
> Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

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the adjudication of his or her ineffective assistance in criminal cases. Under Rule 13, the Hawaii Supreme Court

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Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the

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appoints a special master "to determine whether action against the counsel alleged to have been incompetent is

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appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

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warranted." Haw.Sup.Ct.R. 13. Within five days of this appointment, the special master notifies the defense counsel by mail. Within forty-five days of this mailing, the defense counsel must "file with the clerk of the supreme court an answer showing cause why corrective action as provided [in the Rule] should not be taken by the supreme court." *Id.* Within five days of receiving the defense attorney's answer, the special master must appoint an attorney to prosecute the proceedings. *Id.* The defense attorney and the special prosecutor then have forty-five days to conduct discovery. Within thirty days after the expiration of the discovery period, the special master holds a hearing. Within ten days after the conclusion of the hearing, the special master must render a decision and enter "an order either dismissing the proceedings or recommending corrective action against the respondent attorney." *Id.* Within twenty days of the special master's decision and proposed order, the defense attorney and the special prosecutor may file exceptions with the Hawaii Supreme Court. Within forty days of the

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Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

special master's decision and proposed order, the Supreme Court must "enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth" in the Rule. *Id.*

In accordance with Rule 13, on February 3, 1986, the Hawaii Supreme Court appointed Gedan as the special master. On February 7, 1986, Gedan notified Partington that he had forty-five days to submit an answer "showing cause why corrective action as provided for in Rule 13 should not be taken by the Supreme Court." On March 27, 1986, Partington filed an answer in accordance with the Rule. Without waiving any constitutional challenges, Partington's answer stated that he based all of his trial decisions on certain tactics, but that he could not explain his tactical choices because his client at trial, Clarke, refused to waive the attorney-client privilege.

Gedan did not appoint a special prosecutor within five days of receiving the answer as provided in Rule 13; however, on August 13, 1986, Gedan appointed Chang as the special prosecutor. Notwithstanding the time schedule set forth in Rule 13, the record does not reflect that the parties engaged in discovery during the forty-five day period as provided in the Rule or that the special master set the matter for a hearing within thirty days of the close of the discovery period.

On March 9, 1987, Partington filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Hawaii, naming Gedan and Chang as defendants. He alleged that the conduct of Gedan and Chang pursuant to Rule 13 deprived and continue to deprive him of rights under the free speech clause of the first

amendment, the due process clause of the fifth and fourteenth amendments, the right to counsel clause of the sixth amendment, and the equal protection clause of the fourteenth amendment. The complaint sought (1) an injunction prohibiting Gedan and Chang from proceeding against Partington pursuant to Rule 13, (2) a declaratory judgment that Rule 13 as applied to Partington is unconstitutional, and (3) attorney's fees, costs, and expenses for the action. Partington also sought damages for attorney's fees and costs arising out of the Rule 13 proceeding, but later abandoned this claim. On March 30, 1987, Gedan and Chang moved to dismiss the complaint, arguing the the district court should abstain. They asserted that Partington could raise all of his constitutional claims in the Rule 13 hearing, which was scheduled to commence on April 14, 1987. The Rule 13 hearing was not held that day because Gedan stayed the hearing on Partington's request. On April 22, Partington filed a motion for summary judgment. On May 12, the Hawaii Association of Criminal Defense Lawyers (Defense Lawyers) lodged a brief in the district court on behalf of Partington as amicus curiae.

On July 1, 1987, the district court granted the Defense Lawyers' motion to file the amicus brief, granted the motion of Gedan and Chang to dismiss the complaint, and denied Partington's motion for summary judgment. The district court concluded that *Younger* abstention, as interpreted and applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (*Middlesex*), should be applied. After the district court entered its judgment,

Partington filed a timely notice of appeal, challenging the dismissal of the complaint.

II

Ordinarily, the dismissal of a complaint without the dismissal of the underlying action is not considered an appealable final order under 28 U.S.C. § 1291. *See Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir.1984); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984) (*Hoohuli*). Here, the district judge abstained, but maintained jurisdiction over the cause by virtue of his failure to dismiss the underlying action. This procedure, if allowed, would grant the state permission to proceed first but allow the parties to maintain a federal court presence, if needed, after the state has finalized its assessment of the issues presented. *See Crane v. Fauver*, 762 F.2d 325, 328-29 (3d Cir.1985). We have jurisdiction over this interlocutory appeal, however, because of the denial of Partington's request for an injunction preventing Gedan and Chang from proceeding against him pursuant to Rule 13. *See* 28 U.S.C. § 1292(a)(1); *Sea Ranch Association v. California Coastal Zone Conservation Commission*, 537 F.2d 1058, 1061 (9th Cir.1976).

There is another reason why we may accept jurisdiction over this appeal. We have held that where *Younger* abstention is applicable, "a district court must dismiss the action." *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir.1987) (*World Famous Drinking Emporium*), *quoting Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir.1986). Because the district judge was required to

dismiss the action, we may assume he intended to do so and treat the dismissal of the complaint as a dismissal of the action. *See Hoohuli*, 741 F.2d at 1171 n. 1.

That brings us to our standard of review. When the district court, pursuant to the authority of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), abstains from addressing the constitutionality of a state statute because state court proceedings interpreting the statute are still pending, we review its abstention for an abuse of discretion. *C-Y Development Co. v. Redlands*, 703 F.2d 375, 377 (9th Cir.1983). But when, as here, the district court abstains on the basis of *Younger*, which forbids federal courts from enjoining pending certain categories of state proceedings except in extraordinary circumstances, we review its abstention de novo. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir.1984) (*Goldie's Bookstore*). This de novo review is applied even though we are reviewing the action of the district court in granting or denying an injunction. *See id.*

III

Although abstention is the exception, not the rule, *see World Famous Drinking Emporium*, 820 F.2d at 1082, *Younger* and its companion cases generally require a federal district court to abstain from granting injunctive relief when state criminal actions or certain categories of state civil or administrative proceedings are pending against the federal plaintiff at the time he or she commences the federal action. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1522, 95 L.Ed.2d 1 (1987) (*Pennzoil*) (injunctive relief against a prevailing civil litigant

attempting to execute a judgment in its favor pending appeal of that judgment to a state appellate court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986) (*Dayton Schools*) (injunctive relief against administrative proceedings conducted by state civil rights commission); *Middlesex*, 457 U.S. at 428-29, 102 S.Ct. at 2519 (injunctive relief against state bar disciplinary proceedings); *Moore v. Sims*, 442 U.S. 415, 423, 433-35, 99 S.Ct. 2371, 2377, 2382-83, 60 L.Ed.2d 994 (1979) (*Moore*) (injunctive relief against state proceeding seeking to protect allegedly abused children); *Trainor v. Hernandez*, 431 U.S. 434, 435-38, 97 S.Ct. 1911, 1913-15, 52 L.Ed.2d 486 (1977) (*Trainor*) (injunctive relief against a state civil attachment/enforcement proceedings); *Juidice v. Vail*, 430 U.S. 327, 333-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977) (*Juidice*) (injunctive relief against state contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-07, 95 S.Ct. 1200, 1207-09, 43 L.Ed.2d 482 (1975) (*Huffman*) (injunctive relief against state civil proceedings seeking abatement of a nuisance); *Younger*, 401 U.S. at 49-53, 91 S.Ct. at 753-755 (injunctive relief against state criminal proceedings). The *Younger* abstention doctrine is based on considerations of equity, comity, and federalism. *See, e.g., Pennzoil*, 107 S.Ct. at 1525-26; *Younger*, 401 U.S. at 43-45, 91 S.Ct. at 750-51.

A.

In applying the *Younger* doctrine, federal courts must examine (1) the nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal

relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings. *See Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521; *World Famous Drinking Emporium*, 820 F.2d at 1081, 1082. Courts must also examine whether the proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate." *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. But where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973) (*Gibson*); *compare Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975) (dictum agreeing that a biased state tribunal removes predicate for *Younger v. Harris* dismissal, but categorizing biased tribunal in *Gibson* as example of "extraordinary circumstance" rendering state tribunal incapable of fairly and fully adjudicating issues before it).

1.

Younger by its own terms requires federal courts to abstain from interfering in state criminal proceedings absent exceptional circumstances. *See* 401 U.S. at 53-54, 91 S.Ct. at 754-55. The Supreme Court, however, has never held that federal district courts should always abstain under *Younger* when state civil proceedings are pending. *See Moore*, 442 U.S. at 423 n. 8, 99 S.Ct. at 2377 n. 8; *Huffman*, 420 U.S. at 607, 95 S.Ct. at 1209. Nonetheless, the Court has held that, under *Younger*, federal courts should

abstain from interfering with state disciplinary proceedings analogous to the Rule 13 proceeding currently pending against Partington. *See Middlesex*, 457 U.S. 423, 102 S.Ct. 2515. In *Middlesex*, the Middlesex County Ethics Committee, a tribunal under the jurisdiction of the New Jersey Supreme Court, charged Hinds, a member of the New Jersey Bar, with violating two New Jersey disciplinary rules. *Id.* at 425-28, 102 S.Ct. at 2518-19. Rather than filing an answer to the charges as provided in the New Jersey Bar disciplinary procedures, Hinds filed suit in federal district court, alleging that the disciplinary rules violated his first amendment rights and were facially vague and overbroad. *Id.* at 429, 102 S.Ct. at 2519. The district court abstained under *Younger*, but was reversed by the Third Circuit. *Id.* at 429, 102 S.Ct. at 2519.

Recognizing that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved," the Supreme Court proceeded to review the New Jersey State Bar disciplinary proceedings in light of the three requirements for abstention under *Younger*. *Id.* at 432, 102 S.Ct. at 2521. First, observing that the local Ethics Committees acted as an arm of the New Jersey Supreme Court, the Court determined that "[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee." *Id.* at 433-34, 102 S.Ct. at 2522. Significant to the Court's determination that the state disciplinary proceedings were "judicial" in nature was its analogizing of the role local ethics or bar associations to that of a special master. *Id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13. Next, the Court acknowledged that the state "has an *extremely important*

interest in maintaining and assuring the professional conduct of the attorneys it licenses," especially "the professional conduct of attorneys involved in the administration of *criminal* justice." *Id.* at 434, 102 S.Ct. at 2522 (emphasis added). Last, the Court opined that because Hinds "failed even to *attempt* to raise any federal constitutional challenge in the state proceedings," he had not shown that "the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees." *Id.* at 435, 102 S.Ct. at 2522 (emphasis in original). Having concluded that the three prerequisites for *Younger* abstention were satisfied, the Court reversed the Third Circuit, holding that it was proper for the district court to have stayed its hand in this case. *See id.* at 437, 102 S.Ct. at 2524.

The Rule 13 disciplinary proceeding initiated against Partington in Hawaii is strikingly similar to the New Jersey disciplinary proceedings at issue in *Middlesex*. Both proceedings are conducted by an ethics committee or its analogue, a special master, *id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13, under the auspices of the state supreme court. *Compare* 457 U.S. at 425-27, 433, 102 S.Ct. at 2518-19, 2522 *with* Haw.S.Ct.R. 13. Just as the Court in *Middlesex* concluded that the State of New Jersey had a "special" interest "in the professional conduct of attorneys involved in the administration of criminal justice," 457 U.S. at 434, 102 S.Ct. at 2522, we conclude that Hawaii has a vital interest in ensuring that defense counsel in criminal cases perform within the standards of reasonable professional competence. Partington concedes, as he must, that the State of Hawaii has a very important

interest in its Rule 13 proceedings. Thus, the first requirement for *Younger* abstention has been met. In addition, there is no question that the Rule 13 proceedings had begun and were still pending at the time Partington filed suit in the district court. Partington concedes this point as well. Thus, the second requirement for *Younger* abstention has been met. Unless Partington can show that, unlike the New Jersey state disciplinary proceedings discussed in *Middlesex*, the Rule 13 proceedings against him do not offer him an opportunity to raise his constitutional claims and have them timely decided by a competent state tribunal, *see Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524; *Gibson*, 411 U.S. at 573-74, 93 S.Ct. at 1695, or that this proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," *Middlesex*, 457 U.S. at 435, 437, 102 S.Ct. at 2522, 2524, *Middlesex* governs and we must, accordingly, affirm the dismissal of this action under *Younger*.

2.

Under the third prong of the test for *Younger* abstention, federal abstention is inappropriate unless the plaintiff is afforded the opportunity in the ongoing state proceedings to raise his constitutional claims "and have [those claims] timely decided by a competent state tribunal." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697; *accord Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Partington strenuously advances two grounds why the Rule 13 proceedings against him fail to meet this third required predicate for *Younger* abstention.

First, he maintains that the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel, thereby depriving him of an opportunity to raise his federal constitutional claims during his Rule 13 proceedings. If a federal plaintiff cannot raise his federal claim in the state proceedings because state procedures do not afford him the opportunity to do so, then abstention is not appropriate. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 860 n. 9, 43 L.Ed.2d 54 (1975). Partington argues that abstention is inappropriate here because Clarke's refusal to waive the attorney-client privilege disables him from contesting the ineffectiveness of counsel issue in either the Rule 13 proceedings or in the Hawaii Supreme Court. Partington believes that the "self-defense" exception to the attorney-client privilege, *see* Disciplinary Rule 4-101(c)(4),[2] only applies when the

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[2] Disciplinary Rules, DR 4-101, *Preservation of Confidences and Secrets of a Client*, provides:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

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client questions the attorney's conduct. Clarke has not done so. We interpret this argument to mean that Partington believes Hawaii's interpretation of the attorney-client privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense.

Partington bears the burden of showing " 'that state procedural law bar[s] presentation of [his] claims.' "

(Continued from previous page)

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Pennzoil, 107 S.Ct. at 1528, *quoting Moore*, 442 U.S. at 432, 99 S.Ct. at 2381. Asserted ambiguities in Hawaii's rule regarding the attorney-client privilege or on the procedures available in Rule 13 proceedings for the presentation of his federal claims do not relieve him of this burden. Federal courts "cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Pennzoil*, 107 S.Ct. at 1528. Moreover, given that Partington "has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.*; *see also Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. In addition, even if a federal plaintiff cannot raise his constitutional claims in state administrative proceedings that implicate important state interests, his ability to raise the claims via state judicial review of the administrative proceedings suffices. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. Requiring a federal plaintiff to present his constitutional challenges in the state proceedings recognizes that state courts can and will perform their responsibility to safeguard federal constitutional rights. *See, e.g.*, *Pennzoil* 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520; *Trainor*, 431 U.S. at 443, 97 S.Ct. at 1917.

Partington has not met his burden. He does not explain how this alleged procedural bar prevents him from presenting his first, fifth, sixth, and fourteenth amendment claims in the Rule 13 proceedings. Nor has Partington unambiguously shown that Hawaii's "self-defense exception" to the attorney-client privilege, *see* DR

4-101(C)(4), *only* applies when a client attacks his attorney's conduct. *Cf.* ABA/BNA Lawyer's Manual on Professional Conduct, *Disclosure: Attorney's Benefit*, at 55:701, 703, 706-08(BNA)(Nov. 11, 1987) (discussing cases where the privilege does not apply even though the client is not attacking the attorney's conduct.) In any event, Partington "should first set up and rely upon [this procedural] defense in the [Hawaii] state courts." *Younger*, 401 U.S. at 45, 91 S.Ct. at 751, *quoting Fenner v. Boykin*, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926). We cannot assume that Hawaii will interpret its attorney-client privilege to bar Partington from speaking in his own defense. *Pennzoil*, 107 S.Ct. at 1528.

Second, Partington argues that the third prong for abstention is not met in this case because both the special master and the Hawaii Supreme Court are biased against him. In *Gibson*, the Supreme Court recognized that if the federal plaintiff can establish that either the state administrative tribunal or the state court is not "competent" because of bias, then abstention is not appropriate. *See* 411 U.S. at 577, 93 S.Ct. at 1697. In addition, it recognized that de novo judicial review on the decision of a "biased" administrative board does not satisfy the competent tribunal requirement of the third predicate for *Younger* abstention. *See id.* & n.16. Here, Partington contends that a finding in the Rule 13 proceeding before the special master or the Hawaii Supreme Court that he rendered effective assistance of counsel would be totally incompatible with the Hawaii Supreme Court's decision in *State v. Clarke*. From this, he concludes that the issue of ineffectiveness has been prejudged against him. Partington further assails the impartiality of the Hawaii Supreme Court

by asserting that the large amount of publicity that *State v. Clarke* generated has biased the Hawaii Supreme Court against his case.

In claiming bias, Partington must overcome the presumption that the special master and the Hawaii Supreme Court are unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). He can rebut this presumption "by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

In support of his claim of judicial bias, Partington relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (*Withrow*). The Court there examined a Wisconsin statute that allowed a state medical examining board to warn and reprimand a physician, to suspend a physician's license temporarily, or to institute a criminal action or an action to revoke a license when it found probable cause under governing criminal or revocation statutes. *Id.* at 37, 95 S.Ct. at 1459. When the medical examining board commenced investigative proceedings against Larkin, Larkin filed suit in federal court under 42 U.S.C. § 1983 seeking an injunction against the investigation, which was initially denied by the federal district court. *Id.* at 39, 95 S.Ct. at 1460. The board subsequently notified Larkin that it would hold a "contested hearing" in order to determine whether to suspend his license temporarily. *Id.* at 40-41, 95 S.Ct. at 1461. The federal district court then enjoined the board because it concluded that by authorizing the board to perform a dual investigatory and adjudicative function, the Wisconsin statute raised serious procedural due process concerns by permitting a physician to lose his liberty or property at

the hands of a biased decisionmaker. *Id.* at 41-42, 95 S.Ct. at 1462.

The Supreme Court reversed the preliminary injunction, concluding that it was "quite unlikely" that the physician would ultimately prevail on his procedural due process challenge. *Id.* at 46, 95 S.Ct. at 1464. Recognizing that biased decisionmakers do not satisfy procedural due process, *id.*, at 46-47, 95 S.Ct. 1464, the Court nonetheless rejected the contention "that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Id.* at 47, 95 S.Ct. at 1464. Instead, the Court emphasized that one who advances such an argument

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and [he] must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. In repudiating the appellant's claim of presumptive bias, the Court observed that when an appellate court reverses an administrative law judge or a lower court judge, procedural due process does not mandate that a new judge retry the case. *Id.* at 48-49, 95 S.Ct. at 1465. Similarly, the Court rejected the proposition that simply because the board issued written findings of fact and conclusions of law in support of its probable cause determination, the board had prejudged the case. *Id.* 56-57, 95 S.Ct. at 1469. The Court pointed out that an initial finding

of probable cause to believe a physician had violated a statute was not logically inconsistent with a subsequent decision, based on complete evidence brought out at an adversarial hearing, that the physician did not violate the statute. *Id.* at 57-58, 95 S.Ct. at 1469-70.

Partington argues with *Withrow* stands for the proposition that bias is established where the accusatory finding is incompatible with any adjudicative finding. He relies on the statement from *Withrow* that "if the initial view of the facts based on the evidence derived from nonadversarial processes as a *practical* or *legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58, 95 S.Ct. at 1470 (emphasis added). From this interpretation of *Withrow*, Partington then argues that the following three factors all indicate that he is legally foreclosed from contesting the Hawaii Supreme Court's finding of ineffectiveness of counsel in *State v. Clarke*: (1) the title of Rule 13, "Proceedings Following Final Adjudication Of Ineffective Assistance Of Counsel In Criminal Cases," indicates that the decision is final; (2) the text of Rule 13, in part, speaks only of the special master determining whether "corrective action" should be taken; and (3) the Hawaii Supreme Court's order appointing the special master states that there was "a finding of ineffective assistance of trial counsel."

Under the third prong of *Younger*, Partington must demonstrate that he would not have an adequate opportunity to litigate his federal constitutional claims – in this case, as he argues, before a competent and unbiased state adjudicator. *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521;

Gibson, 411 U.S. at 577, 93 S.Ct. at 1697.[3] He has not done so. The Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the criminal case. There is neither legal nor practical reason to believe that the Hawaii Supreme Court will be biased on this issue which it has never addressed. We cannot and should not guess how the court will respond. *Withrow* is irrelevant to Partington's unaddressed due process claims.

Moreover, we conclude that Partington has not demonstrated under *Withrow* that, as a practical or legal matter, the special master or the Hawaii Supreme Court is

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[3] The dissent suggests that we have misunderstood the third prong of the *Middlesex* test, the prong requiring that federal claimants have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. It is true that in neither *Middlesex* nor *Younger* is a biased tribunal mentioned under this third prong. The majority and the dissent agree that *Younger* abstention is inappropriate what bias renders a state tribunal incompetent; we disagree over how to categorize the Supreme Court's decision in *Gibson*. *Gibson* analyzed incompetency caused by bias in connection with the plaintiff's opportunity to litigate federal constitutional claims before a competent state tribunal. 411 U.S. at 577, 93 S.Ct. at 1697. The dissent, however, focuses on dictum in *Kugler v. Helfant* categorizing the biased tribunal finding in *Gibson* as an "extraordinary circumstance." 421 U.S. at 124-25 & n. 4, 95 S.Ct. at 1530-31 & n. 4. Despite this dictum, we believe it better to follow *Gibson's* approach of analyzing bias in connection with whether there is an opportunity to litigate the federal constitutional claims, which became the third *Middlesex* prong.

bound by *State v. Clarke* or has prejudged the ineffectiveness issue. *Cf. Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 779 & n. 10 (9th Cir.1982) (rejecting claim that a school board could not, consistent with due process, conduct an impartial hearing to review its prior decision to terminate a teacher's employment). As for the legal issue, the title of Rule 13 is somewhat troubling in that it may indicate that the finding of ineffectiveness is conclusive. Furthermore, the Rule itself is not clear on the issue of whether defense counsel can contest the issue of ineffectiveness anew before the special master and the Hawaii Supreme Court, and the Chief Justice's order appointing Gedan can be read as indicating that the Supreme Court has already decided the ineffectiveness issue. But, as we have already observed, Partington bears the burden of demonstrating, through "unambiguous authority", that both the special master and the Hawaii Supreme Court are precluded from considering the ineffectiveness issue de novo. *See Pennzoil*, 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. We do not believe that Partington has carried this burden by reciting the foregoing factors. Rule 13 states in its second paragraph that defense counsel is only *"alleged* to have been incompetent." (Emphasis added.) The special master, moreover, has the power to dismiss the proceedings. This power presumably includes the power to conclude that the criminal defense attorney did not in fact render ineffective assistance.

The Hawaii Supreme Court's initial determination of ineffectiveness will apparently not have collateral estoppel effect in the Rule 13 proceedings. *See Santos v. State Department of Transportation*, 64 Haw. 648, 652, 646 P.2d

962, 965-66 (1982) (per curiam) (discussing issue preclusion under Hawaii law). This conclusion is consistent with a letter written by the Chief Justice to Partington and others stating that Rule 13 provides "a procedure where the attorney in question ha[s] an opportunity to contest, on his own behalf, the charge of ineffective assistance of counsel, before an impartial master, who is in no way bound by the previous determination in the criminal case. . . ." If the attorney disagrees, the Rule "provides for the master's determination to be reviewed by the Supreme Court. . . ." In *Middlesex*, the Court considered the actions of the New Jersey Supreme Court clarifying Hinds's ability to raise his constitutional challenges. 457 U.S. at 436, 102 S.Ct. at 2523. Although the Hawaii Supreme Court has not formally spoken on this issue, we believe that, in the absence of clear authority to the contrary, the letter of the Chief Justice can be considered as an interpretive gloss for purposes of abstention clarifying that, as a legal matter, Partington will be able to contest the finding of ineffectiveness during his Rule 13 proceedings. In addition, the primary issue before the special master and, perhaps ultimately, the Hawaii Supreme Court, is whether corrective action is warranted under Rule 13. Partington does not contend that the court has prejudged this issue.[4]

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[4] Relying on *Gibson*, the dissent suggests that the majority has misconceived "the basic rule governing abstention and biased state tribunals" (dissent at p. 137) because we require inquiry of a biased state tribunal whether it is biased. Dissent at pp. 137-138. While we do not disagree with the legal premise, the dissent overlooks that there has been no finding that

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We also find no practical limitation on Partington's ability to address any of his arguments to an impartial tribunal. To the extent that Partington believes that certain members of the Supreme Court may be personally biased against him, either by virtue of their finding of ineffectiveness of counsel in *State v. Clarke* or as a result of the high profile nature of the publicity in that case, he may be able to file an affidavit seeking recusal under Haw.Rev.Stat. § 601-7(b) (1985).[5] *Cf. Flangas v. State Bar of*

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the Supreme Court of Hawaii is biased on the constitutional issues.

But more important, *Gibson* is distinguishable from the instant case. The state tribunal in *Gibson* was the Alabama Board of Optometry, "the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry." 411 U.S at 567, 93 S.Ct. at 1692. This Board was comprised solely of practicing optometrists. *Id.* at 571, 93 S.Ct. at 1694. Of course, a tribunal comprised of optometrists does not have the ability to entertain constitutional claims. Optometrists are incompetent in this area; their domain is the visual process, not due process. By contrast, the state tribunal in *Partington* is a court, indeed, the Hawaii Supreme Court. It is comprised of experienced jurists. That this court has the ability to entertain and resolve constitutional claims is incontrovertible. There is simply no comparison between State Supreme Court justices and a group of optometrists in their competency to face constitutional issues: Justices are competent, optometrists are not. Partington has failed to demonstrate that he will not be afforded the opportunity to litigate his constitutional claims before a competent state tribunal. The third prong of *Middlesex* requires us to abstain. Contrary to the dissent's assertion, *Gibson* does not dictate a different result.

[5] Haw.Rev.Stat. § 601-7 provides:

> (a) No person shall sit as a judge in any case in which the judge's relative by affinity or

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Nevada, 655 F.2d 946, 950 (9th Cir.1981) (holding that this court cannot ascertain the availability of the biased adjudicator exception to *Younger* abstention until appellant attempts to avail himself of state statutory procedures to disqualify allegedly biased supreme court justices). Hawaii provides that Hawaii circuit judges and retired Supreme Court Justices may sit on the Hawaii Supreme Court when one of the Justices recuses himself. *See*

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> consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.
>
> (b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

Haw.Rev.Stat. § 602-10 (1985).[6] The statute even contemplates that some cases may arise in which all five Supreme Court Justices would recuse themselves, *id.* Moreover, we must presume that each Hawaii Supreme Court Justice will follow his duty under Haw.S.Ct.R. 5 to "be unswayed by partisan interests, public clamor, or fear of criticism," Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct, Canon 3(A)(1), and to recuse himself if "he has a personal bias or prejudice concerning a party. . . ." Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct,

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[6] Haw.Rev.Stat. § 602-10 provides:

> Parties shall be entitled to bring an appeal before a full court. Oral argument shall be before a full court; provided that in an appropriate case the court in its discretion may dispense with oral argument. In case of a vacancy, or if a justice of the supreme court is disqualified from sitting in any case pending before this supreme court, or is unable to attend, or is absent, or is recused or has been excused, the vacancy or the place of such justice may be temporarily filled by a circuit judge designated by the chief justice or by the appointment of a justice who has retired from the supreme court. Such retired justice chosen to serve as substitute justice shall not be actively engaged in the practice of law. A retired justice, when sitting as substitute justice, shall be compensated at a rate of pay of associate justices of the supreme court. When necessary, the court may consist of five circuit judges, so designated or five retired justices so appointed or any combination of circuit judges and retired justices. After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.

Canon 3(C)(1)(a). Partington has provided no reason to strip these individuals of the "presumption of honesty and integrity." *See Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.[7]

B.

Even if the necessary three predicates exist, however, *Younger* abstention will not be appropriate if the federal plaintiff can establish (1) that the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) that some other "extraordinary circumstances" exist, such as proceedings pursuant to a "flagrantly" unconstitutional statute. *See, e.g., Younger*, 401 U.S. at 49-50, 53-54, 91 S.Ct. at 753, 754-55.

1.

The scope of *Younger*'s bad faith exception is not clear. Although the Court in *Younger* and its progeny has continuously recognized that abstention would not be required if a federal plaintiff could establish that the state court proceedings were instituted in bad faith, the Court has never actually applied the exception. Federal circuit courts, however, have occasionally found that "bad faith" exception applicable. *See, e.g., Rowe v. Griffin*, 676 F.2d

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[7] The dissent draws attention to language in the Chief Justice's April 27, 1987, letter to Partington which, the dissent suggests, indicates that the Chief Justice has prejudged Partington's due process and equal protection claims. Dissent at p. 138 n. 8 & p. 144 n. 24. The Chief Justice is at liberty to recuse himself if his impartiality or the appearance of judicial objectivity is drawn into question.

524, 525-26 (11th Cir.1982); *Heimback v. Lyons*, 597 F.2d 344, 346-47 (2d Cir.1979) (per curiam); *Wilson v. Thompson*, 593 F.2d 1375, 1381-83 (5th Cir.1979). No bad faith has been demonstrated in this case.

2.

Because "[t]he very nature of 'extraordinary circumstances' . . . makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings," *see Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530, 44 L.Ed.2d 15 (1975), the scope of *Younger's* "exceptional circumstances" exception is also unclear. As with the bad faith exception, the Supreme Court has consistently recognized the exception, but has never held that the exception applied.

The exception clearly recognizes, however, that a federal court need not abstain when faced with a flagrantly unconstitutional statute. *See Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55. This aspect of the exception applies only when a statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Id., quoting Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941) (*Watson*); *accord Trainor*, 431 U.S. at 446-47, 97 S.Ct. at 1919.

Partington argues that Rule 13 flagrantly violates the first amendment, procedural due process, and the equal protection clause of the fourteenth amendment on its face

and as applied. We have examined the arguments that Partington makes in challenging Rule 13. He has certainly raised some colorable constitutional arguments. Nonetheless, he has failed to demonstrate that Rule 13 is " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55, *quoting Watson*, 313 U.S. at 402, 61 S.Ct. at 967. Therefore, we reject Partington's argument that this exception prevented the district court from abstaining.

IV

Partington also contends that the Hawaii Supreme Court's decision in *State v. Clarke* (1) violated the first amendment because the decision had a chilling effect on his ability to hold himself out as a competent counsel, (2) violated the fifth and fourteenth amendment because the decision deprived him of a liberty and property interest in his reputation without due process of law, and (3) violated the sixth amendment which he argues "necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrances." Partington believes that both the fifth amendment and the sixth amendment require courts to grant a "pre-deprivation" hearing to all defense counsel alleged to have rendered ineffective assistance and that the Hawaii Supreme Court, in deciding *State v. Clarke* did not comply with these constitutional requirements. Partington argues that the special master lacks the power to analyze these issues or to undo these constitutional harms and that it is unreasonable to believe that the

Hawaii Supreme Court will analyze these issues or undo these harms; therefore, abstention is not appropriate. Accordingly, Partington requests a declaratory judgment stating that in rendering its decision in *State v. Clarke* and concluding that Partington rendered ineffective assistance of counsel, the Hawaii Supreme Court violated the first, fifth, and sixth amendments.

The district court did not expressly address any of these arguments or the requested declaratory relief regarding the Hawaii Supreme Court's decision in *State v. Clarke*. At oral argument, we expressed doubt whether Partington presented these constitutional challenges in the district court concerning the manner and the effect of the Hawaii Supreme Court's decision in *State v. Clarke*. We pointed out that the prayer for relief in Partington's complaint did not request a declaratory judgment that in rendering its decision in *State v. Clarke* the Hawaii Supreme Court violated the first, fifth, and sixth amendments. Rather, the complaint states that because of the defendants' action he "is entitled to . . . [a] declaratory judgment that HSCR 13 as applied to Plaintiff is unconstitutional." At oral argument, Partington contended that his request for declaratory relief in the context of Rule 13 included the first, fifth, and sixth amendment challenges to the Hawaii Supreme Court's decision in *State v. Clarke*. He claims that he couched his request for relief in terms of Rule 13 because the Hawaii Supreme Court's decision in *State v. Clarke* was the "first step" under Rule 13. He argued that even if his complaint was not totally clear on the requested relief, his brief in the district court made his argument concerning the Hawaii Supreme Court's decision in *State v. Clarke* clear.

Gedan and Chang denied that Partington had presented this challenge in the district court. They contend not only that it would be inappropriate to allow Partington to bypass the district court, but also that such an attack on *State v. Clarke* implicates the *Rooker-Feldman* doctrine forbidding lower federal courts to sit in direct review of state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *see also Mackay v. Pfeil*, 827 F.2d 540, 543-45 (9th Cir.1987) (per curiam); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-93 (9th Cir.1986) (*Worldwide Church of God*).

We have reviewed Partington's complaint and the brief he submitted to the district court. Although we might be able to read Partington's rather unclear brief as contesting the constitutionality of the Hawaii Supreme Court's decisionmaking process in *State v. Clarke*, his complaint merely sought declaratory and injunctive relief against the defendants – Gedan and Chang – involved in the Rule 13 proceedings. Thus, the lack of clarity in his brief and the wording of his complaint lead us to conclude that he did not clearly raise the issue in the district court.

Ordinarily, we will decline to review an issue not clearly raised in the district court unless necessary to prevent manifest injustice, unless a new issue arises while the appeal is pending because of a change in the law, or unless the issue is purely one of law that is both central to the case and important to the public and the necessary facts are fully developed. *See Romain v. Shear*, 799 F.2d

1416, 1419 (9th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 840 (1987); *Yuchert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir.1985), *rev'd on other grounds*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). Even if one of these exceptions apply, we retain discretion to decline to address the issue.

We decline to review on this appeal Partington's attack on the Hawaii Supreme Court's decisionmaking process and judgment in *State v. Clarke*. The arguments implicate the *Rooker-Feldman* doctrine and neither party has briefed this significant issue. *Cf. Worldwide Church of God*, 805 F.2d at 893 n. 4 (noting that the *Rooker-Feldman* doctrine applies to section 1983 actions).

V

Gedan and Chang requested costs and attorney fees pursuant to Fed.R.App.P. 38. Under Rule 38, we may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir.1987) (citation omitted). Gedan and Chang contend that Partington's attempts to distinguish *Middlesex* were frivolous.

In response to this request for costs and attorney fees, Partington requested sanctions pursuant to Fed.R.Civ.P. 11 against Gedan and Chang for their request for costs and attorney fees. The Defense Lawyers joined Partington's request for sanctions.

We have power to sanction Gedan and Chang pursuant to Rule 11. *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United*

States Aircraft Insurance Group, 823 F.2d 302, 304-05 (9th Cir.1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986).[8] Though Gedan and Chang's request for Rule 38 sanctions appears in their opening brief, we consider their request as a separate motion to this court, severable from the balance of the brief.

The Seventh Circuit's discussion of a request for sanctions under Fed.R.App.P. 38 is particularly appropriate. The court limited its opinion to the defendant's request for attorney's fees under Rule 38. The court stated:

> The plaintiff's appeal, although not meritorious, is plainly not frivolous; it is the defendant's request for Rule 38 sanctions that is

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[8] The dissent suggests that Rule 11 is not a proper basis for imposing sanctions against Chang and Gedan. Conceding that this court has sanctioned attorneys pursuant to Rule 11, the dissent maintains that in each case the sanctionable conduct occurred in the district court. Dissent at 35 & n. 34. The dissent is mistaken. *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), held that:

> Curl's excuses do not relieve him of responsibility for having *brought an appeal* that should not have been brought, for subjecting Harvester to the burden of appellate litigation, and for having put this court to the task of *reading, analyzing, and judging his baseless arguments*. . . The *brief* filed by Curl was not well-grounded in fact and he had not made reasonable inquiry.

Id. (emphasis added). Contrary to the dissent's assertion, dissent at 35 n. 34, *In re Curl* is not ambiguous. This court sanctioned Curl for much more than filing a frivolous notice of appeal in district court; we sanctioned him for conduct occurring in the appellate court.

> frivolous. We are troubled by the frequency with which lawyers in this court, whether representing appellants or appellees, are including in their briefs groundless requests for Rule 38 sanctions. The attitude seems to be, it can't hurt to ask. It can. Any frivolous motion, pleading, or request is subject to sanctions, including a motion or request for sanctions. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir.1987). We remind the bar that sanctions will be forthcoming if counsel routinely request Rule 38 sanctions without careful investigation to determine that the appeal or defense sought to be sanctioned is indeed frivolous. *See also Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir.1987).

Meeks v. Jewel Co., 845 F.2d 1421, 1422 (7th Cir.1988) (per curiam) (*Meeks*). We believe that *Meeks* fully applies to the request for attorneys' fees and costs by Gedan and Chang.

Far from being frivolous, Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent, although not ultimately meritorious. The arguments required us to examine closely the Rule 13 proceedings and interpret whether Partington would be able to raise his serious constitutional challenges to Rule 13 in the Rule 13 proceedings before the special master and, if necessary, on appeal to the Hawaii Supreme Court. Moreover, we fully expect that the special master and the Hawaii Supreme Court will examine carefully and seriously Partington's allegations that Rule 13 violates the first amendment free speech clause as incorporated by the fourteenth amendment, the fifth amendment guarantee of procedural due process as incorporated by the fourteenth amendment,

and the fourteenth amendment equal protection clause, both on its face and as applied. All of these issues are important and will require careful and detailed examination. To charge that these issues are frivolous is surprising – to claim Rule 38 sanctions for Partington's bringing them to our attention is the vice described by the Seventh Circuit in *Meeks*.

We deny the request by Gedan and Chang for Rule 38 sanctions and grant the Rule 11 request by Partington and the Defense Lawyers. We order Gedan and Chang to pay Partington's and the Defense Lawyers' costs and attorneys' fees incurred in responding to the motion for Rule 38 sanctions. The district court is instructed to determine the amount of the sanction.

AFFIRMED.

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court and note that the foundation of the dissent is that the Hawaii Supreme Court "is, as a matter of law, biased against Partington." I do not find it so easy to reach the dissent's conclusion in the light of what, in terms of current law and history, has constituted a biased tribunal. The ideal has always been an absolutely impartial judge. In practice, the ideal has been tempered by the qualification put by the old Constitution of Massachusetts which guaranteed a judge "as impartial as the common lot of humanity will admit." Constitution of Massachusetts, Part 1, Declaration of the Rights of the Inhabitants (1780). What the common lot of humanity will admit has varied.

A leading recent case from this circuit is *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Here a panel consisting of Circuit Judges Kennedy and Tang and District Judge Palmieri considered a criminal appeal by Joseph Conforte, the operator of a legalized house of prostitution in Nevada. The district judge who had presided at his trial had, as president of the Reno Unit of the American Contract Bridge League, participated in the decision to reject Conforte's application to join the League because of his prior convictions and proprietorship of the house of prostitution. At a cocktail party in 1973 the judge had also advised against accepting a contribution from Conforte for the University of Nevada football team. The judge had remarked the Conforte ran a house of prostitution and "was not good for Reno." *Id.* at 879.

District Judge Warren J. Ferguson heard Conforte's motion for a new trial on the grounds of the district judge's bias and found that the district judge had not been disqualified. *United States v. Conforte*, 457 F.Supp. 641 (D.Nev.1978). Upholding this ruling, Judge Kennedy for the panel stated: "We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. . . .[T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind – [that evinces] an aversion or hostility of a kind or degree that a fair minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881.

This standard, it is apparent, is such that a previous legal ruling would not constitute disqualifying bias because it is not the kind of aversion or hostility that a

fair-minded person would be unable to set aside. Specifically, at a later point in the opinion, the panel held: "A judge's view on legal issues may not serve as the basis for motions to disqualify." *Id.* at 882 (citations omitted).

The history that lies behind this treatment of disqualifying prejudice as a term of art is worth reviewing. The Judiciary Act of 1789 provided that district judges should not review their own decisions on appeal to the circuit courts, but at the same time provided that Supreme Court Justices should regularly act as circuit judges and made no provision for disqualifying them from reviewing their own decisions. In 1790 Chief Justice John Jay composed a letter to be sent by the entire Supreme Court to President Washington on this problem. Jay pointed out that having once decided an issue, a justice would not be

> secured against the influence of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly, though, perhaps, too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

Letter from John Jay to James Iredell (Sept. 15, 1790) (enclosing draft), *reprinted in* 2 G. McRee, *Life and Correspondence of James Iredell* (1857). Jay also alluded to the case where a justice might disqualify himself from sitting on his own decision but the public would still believe that in the decision of the Supreme Court reviewing his decision, "mutal interest had generated mutual civilities and tendernesses injurious to right." *Id.* Chief Judge [sic] Jay observed that appellate cases were usually doubtful with "much appearance of reason on both sides"; it would shake the confidence of the losing litigant and the public

if the court in reaching such difficult questions appeared to be biased by the pre-judgment made by one or more of it members.

It is unclear whether any other justice signed Chief Justice Jay's letter. It was never sent. 1 J. Goebel, Jr., *History of the Supreme Court of the United States*, 556 (1971). The Supreme Court did not hesitate to act as a court of appeals from decisions of circuit courts made by the Justices as circuit judges. When in 1803 the practice was finally challenged by a litigant, the Court held that acquiescence in the practice prevented change. *Stuart v. Laird*, 1 Cranch 299, 309 (1803). The practice of judging appeals from one's own decisions continued in the Marshall court. *E.g., The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825).

It could not be much clearer that the Founders and the early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him. Eventually by statute the practice ceased in 1891. Judiciary Act of March 3, 1891, ch. 517, 26 Stat. 826, § 3. But the problem has scarcely disappeared. It is the regular practice of the circuit courts of appeal to schedule sessions en banc in which panel members, who have previously heard the case, sit as members. The session is called a "rehearing" but the reality is that the reargument before the en banc court is a fresh hearing. Often there is new briefing and always there is new oral argument. There are always judges sitting who have never heard the case before. At the same time the judges on the en banc panel who have heard the case the first time and decided it are not

regarded as biased as a matter of law in sitting to judge this fresh appeal.

One difference exists between these practices and the case Partington presents. At least in the practices mentioned a party has had an opportunity to defend himself before the judge who ruled against him the first time, whereas Partington suffered an adverse ruling in a case where he had no possibility of defending himself. This distinction, however, is not material if the question is one of prejudice on the part of the judge. In the federal practices mentioned and in the Hawaii case the judges at one point have made up their minds. In the most literal sense they are prejudiced judges: they have prejudged the case now before them. In the federal practices it was and is assumed that they can unmake their minds and consider the case afresh. Why should this assumption not be the case in Hawaii?

When a litigant was, for the first time, permitted to challenge a federal judge on the grounds of bias, it was on the basis of a statute enacted in 1911. The challenge could only be for "personal bias or prejudice." Act of March 3, 1911, ch. 231, 36 Stat. 1090, § 21. Interpreting this statute, the Supreme Court said that the party seeking to disqualify the judge must "state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice." *Ex Parte American Steel Barrel, Co. and Seaman*, 230 U.S. 35, 43-44, 33 S.Ct. 1007, 1009-10, 57 L.Ed. 1379 (1913). Applying the statute to disqualify District Judge Keneshaw Mountain Landis in 1921, the Court observed that the bias "must be based upon something other than rulings in the case." *Berger v.*

United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). In *Denis v. Perfect Parts*, 142 F.Supp. 263 (D.Mass.1956), Judge Bailey Aldrich had ruled in a previous case that the patent in question was valid. When the same patentee brought a case against a different defendant, the defendant objected that Judge Aldrich was prejudice because he had already ruled on the validity of the patent. Judge Aldrich refused to disqualify himself, ruling, "The statute is directed to personal bias, not to previous judical exposure to the same or similar questions." *Perfect Parts*, 142 F.Supp at 263. The general standard that the bias must be personal and also arise from an extrajudicial source has been stated as the law of this circuit. *United States v. Carignan*, 600 F.2d 762, 763-64 (9th Cir.1979). A judge's participation in a "related or prior proceeding" is not sufficient even though he ruled against one of the present parties in that earlier proceeding. *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir.1981). The dissent appears unwilling to acknowledge that as the law now stands a prior adverse ruling by a judge does not show the judge to be biased.

The point could be raised that the Justices of the Hawaii Supreme Court might be prejudiced because of the publicity attending the reversal in the *Clarke* murder case. The fact of publicity generated by a judge's prior ruling was considered at length in the Watergate case where the defendants included John Ehrlichman, Bob Haldeman and John Mitchell. The Court of Appeals for the District of Columbia, sitting en banc, rejected the defendants' contention that Judge John Sirica had been biased against them because his "public image and reputation" had "become inextricably intertwined with the

prosecution of the Watergate matter." *United States v. Haldeman*, 559 F.2d 31, 137 (D.C.Cir.1976), *cert. denied sub. nom., Ehrlichman v. U.S.*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The court held that this kind of "interest" on the part of the judge was not disqualifying. Interest in order to disqualify must emanate from extrajudicial sources, otherwise "the prohibition would have has a reach far beyond anything Congress could rationally have contemplated." *Id.* The court refused to hold that Judge Sirica had been impermissibly biased. *Haldeman* was favorably cited by Judge Kennedy in *Conforte*, 624 F.2d at 882.

Sensibilities no doubt are changing on the question of judicial bias. In 1765 Blackstone could write: " . . . the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea," 3 W. Blackstone, *Commentaries on the Laws of England* *361. While recusal on the basis of challenge by a litigant has existed in Roman law, canon law, and early English law, it had disappeared by Blackstone's time, *id.*, and was permitted in federal law only in 1911. Since that turning point there have been other signs that judicial disqualification may be looked at more sharply. For example, Judge Aldrich's decision in *Perfect Parts* was criticized by a student writer. Note, "Disqualification of Judges for Bias in the Federal Courts," 79 *Harv.L.Rev.* 1435, 1451 (1966). In 1974 Congress enacted the statute requiring judges to disqualify themselves if a reasonable person could doubt their impartiality. 28 U.S.C. § 455(a). The practice of the Supreme Court in its first century in relation to circuit decisions now looks strange to us. It

may be that the time will come when the participation of panel judges in en banc circuit hearings will appear an impermissible breach of impartiality. It may happen even that prior ruling on a matter will disqualify a judge from sitting on another case involving the same issue. But it is still generally recognized that it is difficult to lay down an absolute rule disqualifying a judge because he has ruled against a litigant in an earlier context. Note, *supra* at 1452. What due process requires is being worked out case by case. Given the history and the current state of law, the federal courts should give the Hawaii Supreme Court a chance to decide what due process requires.

In making that decision, a Justice of the Hawaii Supreme Court will be asking, "Have I so made up my mind by my earlier ruling in the criminal case that I cannot give a fair hearing to Partington's explanation of why he thought his strategy was appropriate?" and "Will public confidence in the courts be diminished if I, a justice who's already found Partington to have given ineffective assistance, now sit on a case where he is defending himself against this charge?" A federal court is not in a position to anticipate how a justice of the Hawaii Supreme Court will answer those questions.

The dissent places weight on a statement in *Withrow*, upholding a procedure in which a later acquittal by the administrative body concerned would not be "logically inconsistent" with a prior finding of probable cause. *Withrow v. Larkin*, 421 U.S. 35, 57, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975). There would, however, be no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary

proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer. The question of sixth amendment deprivation, decided in *Clarke*, is logically distinct from the disciplinary standards which Partington must meet to satisfy the Bar.

The dissent also places emphasis on the "practical" probability of prejudice. But the dissent admits that a judge may charge an attorney with violating Fed.R.Civ.P. 11, order him to show cause, conduct a subsequent hearing, and find against him. The dissent also admits that a court may cite an attorney for contempt of court, order him to show cause, and then preside over the contempt trial and find against him. As a practical matter, the probability of a judge in these circumstances having in mind a vivid impression of the professional breach of the lawyer, and being influenced by this impression, is much greater than the probability of an appeals court, months or years after the initial decision that occasioned the reference of the lawyer to disciplinary proceedings, being still prejudiced against the lawyer. The dissent is on treacherous grounds when it argues that practical prejudice is more likely in Partington's case that in the cases it accepts as routine judicial practice.

Judges have not been particularly good at recognizing their own biases. The major federal reforms have been made by the legislature – the elimination of Supreme Court Justices reviewing their own decisions in 1891; the introduction of recusal motions by litigants in 1911; the reasonable person test of objectivity in 1974.

This history suggests the need for heightened self-scrutiny. The impartiality that "the common lot of humanity will admit" is now closer to the ideal.

REINHARDT, Circuit Judge, concurring and dissenting.

I concur only in the order set forth at the end of part V of the majority opinion which awards certain costs and attorneys' fees to Partington and the Defense Lawyers. I dissent from the rest of Part V and all of Parts I through IV.

I do not believe that this is one of those exceptional cases in which *Younger* abstention is required. *See World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987). Rather, I believe we should now decide that by virtue of its prior decision in *State v. Clarke*, the Hawaii Supreme Court is biased against Partington on the issue whether he rendered ineffective assistance of counsel and that its holding of a disciplinary hearing would violate his due process rights. After applying the three-part test from *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), the majority concludes that *Younger* abstention is applicable. The majority would permit the Hawaii Supreme Court to resolve the question of its own bias. It reaches this conclusion solely on the basis of its reading of the third part of the *Middlesex* test. As the majority describes that part of the test, the plaintiff must be able "to litigate his federal constitutional claims . . . before a competent and unbiased state adjudicator." Majority op. at 125. Because the majority concludes that

the Hawaii Supreme Court may not be biased on the "constitutional question", it opts for abstention.

The majority misconceives the third part of the *Middlesex* test. Bias plays no role in the application of the three-part test. Rather, bias is an entirely separate matter. Where bias exists, *Younger* abstention is inapplicable, regardless of whether the three-part test is met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975). The bias need not be on any particular claim. All that is necessary to bar abstention is that the Hawaii Supreme Court be biased on the disciplinary proceedings. Here, under Hawaii Supreme Court Rule 13, the supreme court would have to determine whether Partington rendered ineffective assistance of counsel to Clifford Clarke. However, that court has already decided in *State v. Clarke* that Partington's assistance *was* ineffective and that a murder conviction against Clarke must be reversed for that reason.[1] Thus, Partington would be subjected to judgment by a tribunal which has already reached a judgment *on the merits* of his case.[2] Because of its prior actions, the Hawaii Supreme Court is, as a matter of law, a biased forum with respect

[1] At the oral argument in *State v. Clarke*, one of the justices of the Hawaii Supreme Court accused Partington of misconduct, contending that he had been deliberately ineffective at trial. As discussed in the text, the Hawaii Supreme Court ultimately reversed Clarke's conviction on the grounds that he received ineffective assistance from Partington.

[2] Subjecting Partington to disciplinary proceedings before a biased tribunal would violate his due process rights. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).

to the Partington proceedings and the federal courts need not abstain.

The majority offers recusal of all of the justices of the Hawaii Supreme Court as a solution to the prejudgment problem. However, the structure of Rule 13 makes it clear that recusal of the entire court is not an available option in this case. Rule 13 was specifically designed to ensure that the justices of the supreme court would make the final determination of ineffective assistance, not a different group of judges. Recusal of the entire court in cases like Partington's would run directly contrary to the language and intent of the rule.

My conclusion that the Hawaii Supreme Court is biased against Partington is not meant to disparage the members of the court. They are undoubtly able individuals and are entitled to a presumption of honesty and integrity. They have no adverse pecuniary interest. Nevertheless, other "[c]ircumstances and relationships must be considered." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue. The disciplinary proceedings must "satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). In *State v. Clarke*, the justices concluded that the legal assistance Partington provided Clarke was ineffective, the very determination they would be called upon to make again in the Rule 13 proceedings. For this reason, a "realistic appraisal of psychological tendencies and human weakness" compels the conclusion that the Rule 13 proceedings involve an intolerably high risk of bias or prejudgment by the Hawaii

Supreme Court. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Under these circumstances, abstract principles of comity, *Younger v. Harris*, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), as important as they are, do not bar a federal court from exercising its jurisdiction.

In my view, we would not only be performing our duty as a federal court properly, but would be saving the Hawaii Supreme Court the expenditure of much unnecessary time and effort were we to declare Rule 13 unconstitutional now. I see little choice for the Hawaii court when Partington's case reaches the justices. If they fail to invalidate the rule, certainly the federal courts will ultimately be required to do so.

I

RULE 13

Hawaii Supreme Court Rule 13 provides a procedure for determining whether a defense attorney should be disciplined for providing ineffective assistance of counsel. Under the rule, whenever a criminal conviction has been overturned on that ground by either the supreme court or the intermediate appellate court[3], the supreme court appoints a special master to decide whether action against the attorney is warranted. The special master, in turn, appoints a special prosecutor. At the conclusion of the proceedings, the special master dismisses the proceedings or recommends to the supreme court that corrective action be taken against the attorney. Both the

[3] See note 28, *infra*.

attorney and the special prosecutor may file exceptions to the special master's decision with the court. The supreme court reviews the special master's decision; the Court then makes an independent determination[4] whether the attorney provided ineffective assistance to the defendant and on that basis decides whether to dismiss the proceedings or order corrective action against the attorney.

II

PREJUDGMENT

Clearly, the critical feature of the Rule 13 proceedings is the determination of the Hawaii Supreme Court is required to make with respect to counsel's ineffectiveness. It must make this critical determination regardless of whether it or the intermediate appellate court made the earlier determination that counsel's representation was ineffective, and reversed the criminal conviction on that ground. Here, we are presented with an extreme form of the Rule 13 process: the supreme court, *sua sponte*, raised and determined the ineffectiveness issue during the criminal proceeding; it would now be required to resolve the identical issue a second time in the disciplinary proceeding.

The majority first asserts that *Younger* abstention is appropriate here because "[t]he Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the

[4] See note 12, *infra*

criminal case. . . .We cannot and should not guess how the court will respond." Majority op. at 126. Thus, the majority apparently takes the position that Partington must demonstrate not only that the Hawaii Supreme Court has prejudged the merits of the disciplinary proceeding but also that the court has prejudged the issue of *whether* it has prejudged the merits of that proceeding.

The majority's argument misconceives the basic rule governing abstention and biased state tribunals. The fundamental principle is that compelling an individual to present his case to a biased tribunal offends due process and federal courts will enjoin such an unconstitutional proceeding. *Gibson v. Berryhill*, 411 U.S. 564, 570, 577, 93 S.Ct. 1689, 1693, 1697, 36 L.Ed.2d 488 (1973). When a federal claimant alleges that a state adjudicator is biased, it is the federal court which determines whether that allegation is correct. *See Gibson*, 411 U.S. at 578-79, 93 S.Ct. at 1697-98; *see also Kugler v. Helfant*, 421 U.S. 117, 125, 127-28, 95 S.Ct. 1524, 1531, 1532, 44 L.Ed.2d 15 (1975). The question is not referred to the state court. If the federal court concludes that bias exists, the finding of a due process violation follows automatically. *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697.[5] No more is required. The federal court does not abstain.[6] In short, abstention

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[5] *Cf. Kugler*, 421 U.S. at 128, 95 S.Ct. at 1532 (framing the abstention issue as whether the "judicial system provides procedural safeguards to guarantee that [the federal court plaintiff] *will not be denied due process of law* in the state trial or appellate process") (emphasis added).

[6] An exception exists where the state provides an alternate procedure which ensures a fair tribunal in place of the biased

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doctrine does not require a person to ask a tribunal that is biased on the merits of his case whether it is in fact biased. Nor must that person ask the biased tribunal whether the fact that it is biased would violate the due process clause. Clearly, it would – as a matter of federal constitutional law, and a federal injunction, not abstention, is the appropriate remedy.

Indeed, the parallel between Partington's situation and the one considered by the Supreme Court in *Gibson* is striking. *Gibson*, like the present case, was a disciplinary proceeding (license revocation) before a body that was allegedly biased on the revocation issue. Thus, the licensee faced a potential due process violation. Notably, in *Gibson*, the Court did not inquire into whether the state licensing agency was biased on the question of the validity of the challenged statutory procedure. Rather, it considered only the question whether the agency was biased as to "the revocation of appellees' licenses." 411 U.S. at 578, 93 S.Ct. at 1697. Moreover, it held irrelevant the fact that the state courts would review the revocation proceeding de novo. *Id.* at 577, 93 S.Ct. at 1697. Finally, the fact that petitioners had not sought to invalidate the unconstitutional state procedure in the available and unbiased state court forum did not deter the Court from affirming the district court's action enjoining the state proceeding. Procedurally, our case and *Gibson* are identical. In my opinion, *Gibson* is controlling here. If the

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tribunal, *e.g.*, by way of recusal. *See Kugler v. Helfant*, 421 U.S. 117, 127-128, 95 S.Ct. 1524, 1532, 44 L.Ed.2d 15 (1975). The applicability of the recusal exception is discussed in Section III, *infra*.

Hawaii Supreme Court is biased as to Partington's disciplinary issues, the result here should be the same as in *Gibson*; we should not abstain.

The majority attempts to distinguish *Gibson* on the basis that "a tribunal comprised of optometrists does not have the ability to entertain constitutional claims." Majority op. at 127 n. 4. This is not a material distinction. In deciding that *Younger* abstention was inappropriate, the Supreme Court did not even mention the fact that "a tribunal composed of optometrists" cannot hear constitutional claims, let alone rely on that fact (if indeed it is a fact).[7] Rather, the Court found *Younger* abstention unwarranted simply because the state tribunal (composed of optometrists or not) was biased *on the revocation issue*. No more was required to be shown in *Gibson*; no more should be required here. This point can not be overemphasized. If, as appears clear, the Hawaii Supreme Court is biased as to the merits of Partington's disciplinary proceeding, that tribunal is not competent to hear that proceeding – regardless of whether non-merit issues may be raised

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[7] I must confess that I do not know whether the majority's description of the powers possessed, in 1973, by the Board of Optometry under Alabama law is correct. In California until a few years ago, administrative agencies, including licensing boards, *did* have the power (and the duty, I believe) to make rulings on constitutional issues. This was so regardless of whether the board was an industry board or an industry-labor board, composed exclusively of laymen, or some other type of board. The Attorney-General's office provided advice to all these boards on constitutional questions and the boards then made their rulings. Long after 1973, the voters of California adopted an initiative measure removing from all administrative boards, including those composed of lawyers, the power to declare statutes unconstitutional

during that proceeding, or whether the court is or is not biased as to any of those non-merit issues.

Conversely, the majority asserts that *Younger* abstention is required here because the Hawaii Supreme Court "has the ability to entertain and resolve constitutional claims." Majority op. at 127 n. 4. In essence, the majority appears to be contending that it is proper to force an individual to appear before a biased tribunal in a disciplinary proceeding, so long as that tribunal could conceivably avoid reaching the merits of the proceeding. My reading of *Gibson* leads me to the contrary conclusion. An individual can *not* be summoned before a biased tribunal when the primary issue before the tribunal is the very issue on which it is biased. It is fundamental that compelling an individual to present his case to a biased tribunal offends due process. *Gibson*, 411 U.S. at 570, 577, 93 S.Ct. at 1693, 1697. An individual required to appear before a state tribunal that is biased on the merits of the proceeding may resort directly to federal court, whether or not the state tribunal has the authority to dismiss the proceedings for bias, lack of jurisdiction, or on any other grounds.[5] As *Gibson* illustrates, the fact that there are state remedies for resolving or determining the fairness of the procedure is irrelevant, regardless of when or in what state forum that determination could be made.

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[5] Where state law provides that a biased judge must recuse himself, the state law does *not*, of course, require the individual to appear before a biased tribunal (except, possibly, in some instances for the limited purpose of filing the disqualification motion). The question of recusal is discussed in Section III, *infra*.

In *Gibson*, the Supreme Court stated explicitly that *Younger* abstention is not required "simply because [state] judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). Moreover, it is clear that the federal court plaintiff in *Gibson* had a completely unbiased state court system in which to seek injunctive relief prior to the administrative proceedings and thus had perfectly adequate state court remedies for his due process claims. For example, he could have asked a state trial or appellate court, rather than a federal district court, to enjoin those proceedings. An unbiased state court is, as the majority points out, generally presumed to be as capable as a federal court of protecting federal constitutional rights. Nevertheless, the Supreme Court in *Gibson* did not require the plaintiff, to first seek relief in state court. Rather, he was permitted to go directly to *federal* court to obtain the appropriate remedy – a federal court injunction against the proceedings in the biased state forum.

The only difference between the facts and circumstances of *Gibson* and those in this case (other than the distinction previously discussed) is that in *Gibson*, the state provided *both* an entirely unbiased state court review of the unconstitutional proceedings *and* an unbiased state court system in which to seek an injunction against the unconstitutional proceedings, while here, there is *neither* an entirely unbiased state forum in which Partington could seek injunctive relief before the unconstitutional proceedings are held *nor* one in which he

could do so afterwards.[9] In Partington's case, the Hawaii Supreme Court is not only the biased forum, but also the first and last judicial body from which Partington may seek relief. Thus, the state court remedies in *Gibson* were, if anything, far *more* hospitable to the plaintiff than those offered to Partington here. As *Younger* abstention was improper in *Gibson*, it is *a fortiori* improper here, if as I conclude, the Hawaii Supreme Court is biased on the ineffective assistance claim.[10]

The majority's confusion regarding abstention and bias appears to be due to its misunderstanding of the third prong of the *Middlesex* test. The majority consistently describes that prong as requiring that Partington have the ability to litigate his constitutional claims before an unbiased state adjudicator. Majority op. at 120-121, 125-126. Actually, the third prong of *Middlesex* does not mention bias – because under *Younger* that issue is dealt with separately. The third prong requires only that Partington have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. The critical fact that the majority overlooks is that in *Younger*, the Supreme Court recognized that even if the three-part test for abstention (as

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[9] I seriously doubt that, as a legal matter, a lower court, in Hawaii or elsewhere, has the authority to enjoin a proceeding before a higher court.

[10] In some instances, a *claim* of bias would be sufficient to preclude abstention, at least until the federal court has had an opportunity to resolve the factual issues relating to the claim. Here, however, there are no factual issues in dispute with respect to the alleged bias.

later described in *Middlesex*) was met, abstention would be improper if the state action was brought in bad faith or for purpose of harassment or in other *extraordinary circumstances*. 401 U.S. at 53-54, 91 S.Ct. at 754-55; *see also Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Bias on the part of the state tribunal is one of those extraordinary circumstances which renders *Younger* abstention inappropriate, even if all three prongs of the *Middlesex* test are met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1531 & n. 4; *cf. World Famous Drinking Emporium*, 820 F.2d at 1082. Thus, if is simply irrelevant whether Partington will be able to raise his constitutional claims before the Hawaii Supreme Court or whether the Court is biased as to those claims; for if the Court has prejudged the merits of the disciplinary proceeding, it is a biased tribunal and *Younger* abstention is inapplicable.[11]

The majority dismisses the Court's statement in *Kugler* that bias is a separate element by calling it dictum. Majority op. at 22 n. 3. Whatever the merits of that categorization, it seems apparent that the Court was correct when it reached its conclusion. *Younger* abstention is barred when, *inter alia*, "extraordinary circumstances" render the proceedings unfair, a concern that is

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[11] It is worth noting that a letter dated April 27, 1987 to Partington from the Chief Justice, a letter the majority appears to accept as the view of the entire court, Majority op. at 126, suggests that the court has in fact prejudged the due process claim. *See* ER 444 (Chief Justice finds "mystifying" Partington's contention that he could not receive an impartial hearing on the ineffectiveness claim). Surprisingly, at a later point in the majority opinion, the letter is summarily dismissed as at most reflecting the opinion of the Chief Justice. Majority op. at 128 n. 7.

independent of whether the federal court plaintiff will have an adequate opportunity in the state proceedings to raise his federal constitutional claims. *Middlesex* listed as examples of this rule a proceeding brought in bad faith or for purposes of harassment. 457 U.S. at 435, 102 S.Ct. at 2522. Certainly a proceeding brought before a biased tribunal is even more unfair to a licensee, and even more violative of his due process rights, than a proceeding that is merely initiated for an improper purpose. In the case of bad faith or harassment, the licensee is required to submit to a proceeding unnecessarily, but should prevail on the merits; in the case of bias, the licensee does not have a fair chance to prevail at all, and an adverse result is, for practical purposes, a foregone conclusion. Thus, the Court's determination in *Kugler* that bias is an "extraordinary circumstance" barring *Younger* abstention was compelled by reason and logic as well as precedent, and the majority clearly errs in rejecting the Court's analysis.

In any event, whether bias is considered separately from the three-prong *Middlesex* test, or whether we disregard the clear language in *Kugler* and consider bias to be a part of the third prong of that test, the result in this case would be the same. As previously discussed, under *Gibson* it is clear that bias on the merits of a disciplinary proceeding is sufficient to preclude *Younger* abstention.

The majority next concludes that the Rule 13 procedure does not present an unacceptable risk of prejudgment on the ineffectiveness issue, although it is far from clear why it reaches that conclusion.[12] Majority op. at 125.

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[12] At one point, the majority argues that Partington has not alleged that the Hawaii Supreme Court is biased "on the

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The majority appears to accept the *Withrow* test, which states that "if the initial view of the facts based on the evidence derived from non-adversarial processes as a *practical or legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question [is] raised." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470 (emphasis added). With respect to the issue of "legal" bias, the majority concludes that Partington has not demonstrated that the Hawaii Supreme Court is legally foreclosed "from considering the ineffectiveness issue de novo." Majority op. at 126. On that point, I am in agreement.[13] However, the majority also concludes that there is

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primary issue . . . [namely] whether corrective action is warranted [against Partington] under Rule 13." Majority op. at 126. Any distinction between whether the court is biased "merely" on the ineffective assistance issue rather than on the corrective action issue is semantic gameplaying at best. I find it hard to believe that anyone would suggest that a court that has prejudged the issue whether Partington rendered ineffective assistance is unbiased on the question whether he should be the subject of disciplinary action. The Hawaii Supreme Court is *necessarily* required to judge the issue on which it is biased *before* determining the appropriate remedy. Obviously, if the court were to decide the issue relating to conduct in Partington's favor, there would be no need for it to reach the question whether corrective action is warranted.

[13] Partington has not demonstrated by unambiguous authority that the court is legally precluded from reconsidering its initial determination of ineffectiveness. For the purposes of our *Younger* analysis, we must assume that the Hawaii

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no "practical" impediment to the Court's examining the issue in a fair and impartial manner. *Id.* at 125, 126. The majority offers *no* explanation for this conclusion, and cites no case law or other authority. In fact, the majority opinion contains no discussion whatsoever of the question whether the Hawaii Supreme Court could, as a practical matter, serve as an unbiased adjudicator. Instead, it avoids the issue entirely, apparently preferring to base its conclusion that Partington will be able to obtain a fair hearing entirely on the supposition that all of the members of the supreme court will recuse themselves.[14] *Id.* at 126.

I believe that, as a practical matter, the Hawaii Supreme Court has prejudged Partington's case. At the very least, there is an intolerable risk of prejudgment. The sole reason Partington is now facing disciplinary proceedings is because in a previous proceeding the Hawaii Supreme Court, *sua sponte*, raised *and decided*, on the merits, the issue of ineffective assistance of counsel in a manner adverse to him. The issue the court previously decided is the identical issue it will now be required to address in the Rule 13 proceedings. In my view, the Hawaii Supreme Court is not, as a practical matter, an unbiased adjudicator.

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Supreme Court is free to reexamine its previous legal conclusion on the question of ineffective assistance. If, however, this assumption turns out to be incorrect, I do not think anyone could argue that the Rule 13 proceeding would satisfy due process.

[14] The question of recusal is discussed *infra*, section III.

There are several federal statutes which are concerned with the issue of judicial bias. *See* 28 U.S.C. §§ 47, 144, & 455 (1982). These statutes are premised on the simple proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). But a fair trial means more than simply the absence of actual bias. "[O]ur system of law has always endeavored to *prevent even the probability of unfairness.*" *Id.* (emphasis added). To this end, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). Thus, we must constantly be alert to procedures which "under a realistic appraisal of psychological tendencies and human weakness . . . pose[] such a risk of actual bias or prejudgment that the practice[s] must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

While we can readily identify the reasons why judicial bias cannot be tolerated, we must still determine when a judge's previous involvement with a case creates such a risk of bias that it would be a violation of due process to allow him to be further associated with the proceedings. Two decisions help frame the issue. Prejudgment, or an unconstitutional risk of prejudgment, has been found where the contents of a speech by a judge "plainly reveale[d]" that he had, prior to the commencement of the proceedings before him, reached a conclusion as to the merits of a case that involved complex questions of fact and law. *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (D.C.Cir.1964), *vacated on other grounds*,

381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714 (1965).[15] Also, judges have been disqualified from presiding over appeals from decisions in cases, or involving issues, originally tried before them as lower court judges. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 137 (5th Cir.1970) (Order of Disqualification and Memorandum of Decision by Craven, J.) (appeals court must "be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance") (quoting *Moran v. Dillingham*, 174 U.S. 153, 19 S.Ct. 620, 43 L.Ed. 930 (1899)).[16]

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[15] Our present Chief Justice has said that the mere fact that a judge has expressed an opinion on a purely legal question would not demonstrate bias or prejudgment, *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum on recusal by Rehnquist, J.). We have reached the same conclusion. *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). The situations discussed by Justice Rehnquist and by this court in *Conforte* were far different from the one present in *Texaco*. *Conforte* is discussed further *infra*, note 20.

[16] In *Swann*, Judge Craven applied 28 U.S.C. § 47, which explicitly forbids the practice of a judge hearing an appeal from a case which he tried. The same result has been reached through application of 28 U.S.C. § 455, which requires a judge to recuse himself to avoid the appearance of impropriety. *Rice v. McKenzie*, 581 F.2d 1114, 1116-18 (4th Cir.1978) (federal judge, who, as chief justice of state supreme court, had presided in affirming appeal of convicted person was disqualified from federal habeas corpus proceedings because of concerns with impartiality). *Cf. Withrow*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25 ("when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review").

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While *Texaco* and *Swann* provide some guidance, there are significant differences between those cases and Partington's. The commissioner's prejudgment in *Texaco* was extrajudicial; the remarks were made during a public appearance and were not based on knowledge the commissioner obtained during an official proceeding. *Cf. United States v. Studley*, 783 F.2d 934 (9th Cir.1986). *Swann* was concerned with the issue of what constitutes a meaningful review by a higher court of a lower court's decision. In the present case, the issue is: when is a court that is called upon to decide a complex question of law and fact as to which it has already reached a final determination in an earlier proceeding presumed to have prejudged the question?

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In light of current practice, the comments in the concurring opinion on the history of the practice of the Supreme Court acting "as a court of appeals from decisions of circuit courts made by the Justices as circuit judges," Concurring op. at 132, and specifically its discussion of *Stuart v. Laird*, 1 Cranch 298 (1803), and *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825), while interesting, shed no light on the specific issue before us. Just as our view of the slave trade has changed from that espoused in *The Antelope*, so too has our view of the propriety of judges sitting in judgment on their own decisions. Moreover, in *The Antelope*, no challenge was made to the individual Justice's participation in an appeal from a case in which he had sat as a circuit judge; perhaps more interestingly, in *Stuart*, "[t]he Chief Justice, having tried the cause in the court below, declined to give an opinion." *Id.* at 306. Most importantly, in neither case did the Justices even consider the question we are presented with, that is, whether a court comprised wholly of judges who decided the same case at a lower judicial level may hear an appeal of that lower court decision, and certainly the concurring opinion does not suggest that any such practice ever existed.

Although *Texaco* and *Swann* are not dispositive, the policies which underlie them compel the conclusion that the Hawaii Supreme Court is biased in this case. The common thread that links *Texaco* and *Swann* is the concept that no person can be compelled to litigate a controversy before a judge whose prior conduct or connection with the case makes it likely that he will have prejudged the outcome. The reason that due process does not permit a judge to hear an appeal of a case he previously tried as a lower court judge has been well stated. "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published opinion." *Swann*, 431 F.2d at 137 (quoting an address by Walter B. Hill to the American Bar Association). The concerns reflected in *Swann* relate not only to the risk that a judge will have actually prejudged a case, but to the appearance of partiality as well. As the Supreme Court made abundantly clear in *In re Murchison*, "justice must satisfy the appearance of justice." 349 U.S. at 136, 75 S.Ct. at 625.

Here, the court which will decide in the disciplinary proceeding whether Partington provided ineffective assistance of counsel is the same body that has already determined in *State v. Clarke* that Partington did precisely that.[17] It has also issued an opinion to that effect and has

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[17] The concurring opinion suggests at one point that prejudgment "must be based upon something other than rulings in the case." Concurring op. at 133, *quoting Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921); *see also Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981) (judge's participation in prior or related proceeding not sufficient to

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reversed a murder conviction on that ground. These circumstances present an unacceptable risk of prejudgment, one that neither Partington nor any other litigant should be required to assume. They also fall far short of satisfying "the appearance of justice".

The conclusion that the Hawaii Supreme Court does not qualify as an impartial body insofar as Partington's Rule 13 proceeding is concerned finds strong support in *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Withrow*, the Court considered whether the combination of investigative and adjudicative functions in a state administrative agency violated due process. It suggested that bias or prejudgment would be established if an initial accusatory finding foreclosed, as a practical matter, a later adjudicatory finding to the contrary.[18] *Id.* at 58, 95 S.Ct. at 1470. The Court concluded that the state practice did not violate due process, because the initial investigative decision was one of probable cause, a determination that would not be logically inconsistent with a subsequent adjudicatory determination of "no violation". *Id.* at 57, 95 S.Ct. at 1469. Or, as the Court put it, a favorable second decision would not constitute an implicit admission that the first was erroneous.

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constitute bias). However, none of the cases the concurring opinion relies upon (with one exception) involves a situation in which, as here, the judges will be called upon to determine the same complex question of fact and law on which they previously reached a final determination. The one exception, *Denis v. Perfect Parts, Inc.* 142 F.Supp. 263 (D.Mass.1956), is discussed in note 20, *infra*.

[18] The majority apparently does not disagree with this suggestion. *See* Majority op. at 124, 126.

Here, the Hawaii Supreme Court has not merely made a preliminary or accusatory finding that Partington *may have* rendered ineffective assistance of counsel. Rather, it has made a finding *on the merits* that the assistance Partington rendered was so ineffective as to require the reversal of a murder conviction. Certainly, a subsequent finding by that same court in a Rule 13 proceeding that Partington had not rendered ineffective assistance of counsel would be logically inconsistent with its prior finding.[19] The Court would "implicitly be admitting error in its prior finding."[20] *Id.* 421 U.S. at 57, 95 S.Ct. at 1469.

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[19] None of this discussion is meant to minimize the problem of ineffective assistance of counsel for criminal defendants, nor to suggest that the Hawaii Supreme Court cannot fulfill its duty to supervise attorney conduct. Nevertheless, the Court cannot exercise its authority in a manner which violates the requirements of due process. A Rule 13 procedure can undoubtedly be devised which meets those requirements. *See infra* pages 146-147.

[20] The concurring opinion concludes that there would be "no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer." Concurring op. at 134 (emphasis in original). The logic of this statement escapes me. If the court determines that Partington's strategy was reasonable and that it justified his trial tactics, I do not see how it could also say that there was a sixth amendment violation. If the strategy justified the tactics, then the assistance was *not* ineffective.

The concurring opinion also concludes, without analysis, that the fact that the Hawaii Supreme Court has already reversed a murder conviction because the defendant received

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The concept of "logical inconsistency", emphasized in *Withrow*, helps distinguish this case from cases holding

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ineffective assistance from Partington does "not constitute disqualifying bias [on the part of the members of the court] because it is not the kind of aversion or hostility that a fair-minded person would be unable to set aside." Concurring op. at 132. However, the case that it relies on, *United States v. Conforte*, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), involved a type of prejudgment wholly unlike the prejudgment present in this case. In *Conforte*, the alleged bias was *personal* – the trial judge had allegedly made derogatory statements about the defendant some years prior to the time when the defendant appeared before the judge. 624 F.2d at 878-79. We held that the bias alleged was not sufficient to require recusal, and that disqualification for *personal* bias required "an animus more active and deep-rooted than an attitude of [non-racial] disapproval toward certain persons because of their known conduct." *Id.* at 881 However, the question of the depth of personal animosity required to constitute disqualifying bias bears no relationship to the question whether a court has actually prejudged the merits of the case before it because it has rendered a final decision in a previous case on the same issue it is now called upon to decide.

The only case that the concurring opinion relies on that is at all factually similar to our case is *Denis v. Perfect Parts, Inc.*, 142 F.Supp. 263 (D.Mass.1956). In that case, the district judge declined to recuse himself at the request of the defendant, although he would be called upon to determine the validity of a patent which he had declared valid in a previous case that involved the same plaintiff but a different defendant. *Id.* at 263. The Judge declined to disqualify himself, because he concluded that 28 U.S.C. § 144, the disqualification statute, "is directed to personal bias, not to previous exposure to the same or similar questions." *Id.* The judge believed that a contrary

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that a judge who initiated the proceedings may preside at the hearing on the merits.[21] For example, a judge who charges an attorney with violating Rule 11 and orders him to show cause is permitted to conduct the subsequent hearing. *See, e.g., Tom Growney Equipment, Inc. v. Shelley Irrigation Dev. Inc.*, 834 F.2d 833 (9th Cir.1987). A determination by the judge at the later hearing that Rule 11 sanctions are not appropriate would not be inconsistent with his issuance of the initial charge. The initial charge or finding is similar to one of probable cause, while the later determination on the merits is akin to one of guilt or innocence. Similarly, when a court cites an attorney for contempt, orders him to show cause, and then presides over the contempt trial, *e.g., Nilva v. United*

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result would minimize or eliminate the value of judicial experience and exposure. *Id. Denis* would thus suggest a different result than the one that I reach here. However, as the concurring opinion points out, "[s]ensibilites no doubt are changing on the question of judicial bias." Concurring op. at 133. Indeed, the author of the opinion in *Denis* has expressed considerable doubt about the decision he reached in that case. *See Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.1977). Thus, *Denis*, while never controlling on this court, cannot any longer even be considered persuasive.

[21] Although Judge Noonan does not disagree with the use of the "logical inconsistency" standard, he would seem to rely on each individual justice's view as to whether he has prejudged Partington's case. *See* Concurring op. at 134. This conclusion appears to be at odds with the prevailing notion that an objective standard is to be used. *See, e.g., Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) *cert. denied* 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); 28 U.S.C. § 455 (1982); *see also* Concurring op. at 134.

States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957), a finding of not guilty is not logically inconsistent with the fact that a charge was preferred. Another example is the issuance of a preliminary injunction by a judge who subsequently presides over a trial in which he determines whether a permanent injunction should issue. This practice is proper because the question at the hearing on the preliminary injunction is solely one of "reasonable cause"; no determination on the merits is made at that time. Thus, there is ordinarily neither the appearance nor the reality of logical inconsistency or prejudgment in any of the above cases when the merits are heard.[22]

At first glance, a more troublesome analogue is presented when a trial judge presides over a trial for the second time after his initial decision has been reversed on appeal. This practice does not generally create a risk of bias or prejudgment implicating due process concerns.[23]

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[22] It is worth noting that the judge who initiates the contempt proceedings is not always permitted to preside over them. For example, if "the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." Fed.R.Crim.P. 42(a). *See also In re Murchison*, 349 U.S. 133, 137, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (trial for contempt during grand jury proceedings before same judge who acted as one-man grand jury violates due process because "[h]aving been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused").

[23] Of course, an appellate court may, under its supervisory powers, reassign the case on remand to a different trial judge, if it determines under the circumstances of the case that allowing the same judge to rehear the case poses an unacceptable

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See, e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219, 236, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947); *United States v. Hollis*, 718 F.2d 277 (8th Cir.1983), *cert. denied*, 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984). However, our judicial system has built-in mechanisms that serve to protect litigants against the risk of prejudgment in such cases, and help to maintain the appearance of impartiality. When a trial judge presides over a trial after remand, intervening appellate guidance significantly minimizes the risk of bias. The trial judge is advised that his initial decision was incorrect, and receives specific guidance from the reviewing court as to the aspects of the trial which created reversible error. Usually, the trial judge is also given specific instructions as to what remedial or corrective actions should be taken in the second trial. In addition, the decision in the second trial will itself be subject to judicial review. That review also serves as an independent restraint on the trial judge, because he will be aware that evidence of bias or prejudgment on his part will lead to a second reversal.[24]

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risk of bias. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir.1987).

[24] The practical reality of retrying numerous cases after appeal virtually requires that, with appropriate safeguards, our judicial system allow the same judge who presided over the first trial to preside again after appeal. *United States v. Harris*, 458 F.2d 670, 678 (5th Cir.) (" 'used' judges must simply be recycled" to avoid problem of no judge in a particular venue being able to hear a litigant's case), *cert. denied*, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). Neither the courts generally nor Hawaii courts in particular face a comparable practical problem with respect to the adjudication of disciplinary cases.

None of the procedures which serve to eliminate or reduce the risk of prejudgment when a trial judge rehears a case following reversal or remand are applicable in Rule 13 proceedings. Under Rule 13, there is no superior authority that will have informed the supreme court that its initial decision was incorrect prior to the time it hears the issue for the second time; no higher court will have explained to the Hawaii Supreme Court the nature of its errors in the initial proceedings or provided it with guidance as to those errors. Nor will the supreme court have had the benefit of specific instructions as to how to conduct the second proceeding. While remand to a trial court occurs because that court's initial decision has been found to be incorrect and has been reversed, no comparable events will have occurred here. To the contrary, the disciplinary proceedings will take place here because the Hawaii Supreme Court's determination of ineffective assistance has *not* been vacated or set aside by a higher court. Equally important, the supreme court's determination in the Rule 13 proceedings will be final, with no right of appeal to a superior judicial body.[25]

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[25] The concurring opinion suggests that our current en banc practice also presents a troublesome analog. Concurring op. at 131-133. However, that circumstance is wholly different from the one with which we are now confronted. When a circuit court sits en banc, the court *rehears* the case at issue, just as the original panel may. The en banc judges do not, as the Hawaii Supreme Court under Rule 13 is required to do, decide a complex issue of fact and law on which the court has already reached a *final* determination in a *prior* case. The practice of granting a rehearing in a pending case poses none of the problems presented by a court requiring a party to submit to it for decision an issue on which the court has already rendered a final decision adverse to that party.

For the reasons discussed above, I cannot agree that Partington must show more than the fact that the Hawaii Supreme Court is biased on the merits of the disciplinary proceeding. Nor can I agree that Partington has failed to establish the existence of that bias. In my opinion, the court's prior determination in *State v. Clarke* that Partington provided ineffective assistance would "give[ ] fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *United States v. Haldeman*, 559 F.2d 31, 136 (D.C.Cir.1976) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The Supreme Court has warned us to "be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow*, 421 U.S. at 54, 95 S.Ct. at 1468. The majority fails to consider sufficiently the nature of the triggering determination in Rule 13 proceedings, and thus gives short shrift to the very real problem of prejudgment the rule presents. The Supreme Court has held that, if a state administrative agency is biased, *Younger* abstention is inappropriate even if state "judicial review, *de novo* or otherwise, would be forthcoming at the close of the administrative proceedings." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). The same conclusion holds true *a fortiori* where, as here, the biased decision of a court will not be subject to *any* review.[26]

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[26] The majority opinion contends that Hawaii's Rule 13 disciplinary procedure is "strikingly similar" to the New Jersey disciplinary proceeding which the Supreme Court held, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), provided a

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III

RECUSAL

In concluding that Partington will be able to bring his claims before an impartial tribunal, the majority does not determine whether the justices of the Hawaii Supreme Court have, as a *practical* matter, prejudged his claim; nor does it consider whether disciplinary proceedings before those justices would give the requisite appearance of impartiality. *See* Majority op. at 120. Rather, its conclusion is based entirely on Partington's supposed ability to obtain the recusal under Haw.Rev.Stat. § 601-7(b) (1985) of all five of the justices of the court.[27] Majority op. at

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charged attorney with an adequate opportunity to raise his constitutional claims. Majority op. at 121. However, any "similarity" between the two systems is at most superficial, and in any event irrelevant to the question of prejudgment.

Under the New Jersey attorney disciplinary system, a local Ethics Committee is authorized to receive complaints about attorney misconduct. It then makes an initial determination whether an attorney should be disciplined for unethical conduct. 102 S.Ct. at 2518. If the Committee determines that disciplinary action is warranted, it prepares a presentment for the Disciplinary Review Board. *Id.* at 2518-19. The Review Board then decides what disciplinary action, if any, is warranted. The New Jersey Supreme Court's *first* involvement with the proceedings is when it reviews the Review Board's decision. *Id.* at 2519.

[27] Although the majority refers to Partington's ability to seek recusal of *"certain* members of the Supreme Court [who] may be personally biased against him . . . by virtue of their finding of ineffectiveness of counsel in *State v. Clarke,"* Majority op. at 127 (emphasis added), the opinion in *Clarke* shows that *all* of the justices found that Partington's assistance was ineffective. ER 158-59.

126-128. In short, the majority appears to assume that some group of judges other than the sitting supreme court justices will hear Partington's case. Once again the majority does not discuss the legal issue involved, that is, whether Hawaii's recusal statute is applicable here; this time it simply asserts, *ex cathedra*, that it is.

Hawaii law provides for recusal of the entire court "[w]hen necessary." Haw.Rev.Stat. § 602-10. On its face, this language would seem to support the majority's position. But recusal statutes are generally addressed to claims of bias in individual cases, that is, the problem of alleged bias on the part of some or all of the justices arising from the peculiar facts of an individual case or group of related cases. *Cf.* C. Wolfram, *Modern Legal Ethics* 982-99 (1986) (discussion of disqualification of judges for interest or bias contains no mention of types of bias other than individual). Rule 13 presents a very different problem than is usually addressed under recusal statutes. Under Rule 13, prejudgment is not the exceptional case, arising only under unusual circumstances. Rather, the conflict the Hawaii Supreme Court justices are confronted with in Partington's case is the *inevitable* result of the way the rule is structured. That structure ensures that prejudgment will be endemic in disciplinary cases. Far from being a random occurrence during a particular Rule 13 proceeding, prejudgment is the institutional norm.

Under Rule 13, the Hawaii Supreme Court makes the final determination in all disciplinary proceedings as to whether an attorney provided ineffective assistance of counsel. The event that triggers the Rule 13 proceedings is a determination, made in a criminal proceeding, by the supreme court or the intermediate appellate court or both

that the attorney did in fact provide ineffective assistance.[28] The supreme court may have been the first court to make that determination in the criminal proceeding or it may have affirmed the finding of the intermediate court.[29] Wherever or however the determination of ineffectiveness was made in the criminal proceeding, Rule 13 vests the Hawaii Supreme Court with the authority to make the subsequent ineffectiveness determination in the disciplinary proceedings.

As already noted, the majority contends that recusal of all of the Hawaii Supreme Court justices will solve whatever bias or prejudgment problem Partington may face. However, the majority's "solution" would not apply to Partington's case only. It would require the recusal of every member of the supreme court in every case which was initiated because the supreme court had made or affirmed the triggering ineffectiveness finding. *All* such cases would be heard by judges who are not sitting members of the Hawaii Supreme Court. Such a procedure

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[28] Disciplinary proceedings are instituted whenever such a determination is made and the criminal conviction is reversed. Haw.S.Ct.R. 13. Conceivably, in rare instances the reversal of a conviction on the ground of ineffective assistance of counsel could originate in the trial court. However, in such cases, there is still a reasonable possibility that the determination will subsequently be affirmed (or reversed) by the intermediate appellate court, the supreme court, or both. Accordingly, there is no need to consider these cases separately, and they are subsumed within the discussion contained in the text.

[29] Of course, where the intermediate appellate court makes the determination in the criminal proceeding and the decision is not reviewed by the supreme court, no due process issue is presented by the provisions of Rule 13.

would be directly contrary to the disciplinary system the Hawaii Supreme Court actually enacted, a disciplinary system which contemplates a final determination by the supreme court in *all* cases. The majority's assertion that the recusal statute is applicable here is simply incompatible with the language and intent of Rule 13.

A Rule 13 system could easily have been devised under which the supreme court would make the determination of ineffective assistance of counsel in a disciplinary proceeding if the original finding of ineffectiveness had been made in an unappealed decision of the intermediate appellate court, and the intermediate appellate court would make the disciplinary determination if the supreme court had originated the earlier ineffective assistance finding.[30] But the Hawaii Supreme Court chose not to enact such a system. Instead, it chose to make itself the final judge of whether an attorney had provided ineffective assistance in all cases – those in which it had made or affirmed the earlier determination that the attorney was in fact ineffective as well as those in which only the intermediate appellate court had made such a determination. Rule 13 explicitly provides that the disciplinary proceeding be adjudicated by the supreme court, not by appellate court judges or retired supreme

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[30] If the intermediate appellate court had made the initial ineffectiveness finding and the Hawaii Supreme Court had affirmed, neither the supreme court justices nor the appellate court judges who participated in the criminal proceedings could be involved in the disciplinary case. However, other active appellate court judges as well as retired supreme court justices, retired appellate court judges, or active or retired circuit court judges would be eligible, if authorized by a revised Rule 13.

court justices. If, when it adopted rule 13, the Hawaii Supreme Court had intended that intermediate court judges or retired supreme court justices adjudicate the disciplinary proceedings which had been initiated because of a finding made by the supreme court, it would certainly have included a provision to that effect in the text of the rule.[31]

It is clear that the Hawaii Supreme Court did not intend the recusal statute to be applicable in cases such as Partington's because application of the statute to such cases would do precisely what the court refused to do when it enacted Rule 13. It would require that disciplinary proceedings arising out of reversals ordered by the supreme court, or out of cases in which the supreme court upheld a reversal ordered by a lower court, be adjudicated by a group of judges who are not active members of the court. The majority errs in attempting to save Rule 13 by presuming the applicability of Hawaii's recusal statute.[32] The proper course would be to

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[31] For the same reason, it would not be reasonable to suggest that the court had the recusal statute in mind when it drafted Rule 13, and that it therefore expected retired justices or active circuit judges, *see* Haw.Rev.Stat. § 602-10, to hear those disciplinary cases which result from criminal proceedings which have previously reached the supreme court level. That class of cases constitutes far too significant a part of the potential pool to have been overlooked by the court or excluded *sub silentio* from the regular procedure.

[32] The Supreme Court has held that the ability to seek recusal is sufficient to protect due process requirements. *Kugler v. Helfant*, 421 U.S. 117, 130-31, 95 S.Ct. 1524, 1533-34, 44 L.Ed.2d 15 (1975). In *Kugler*, the Supreme Court affirmed the

(Continued on following page)

invalidate the rule and permit the Hawaii Supreme Court to reenact a version that does not offend due process.

IV
CONCLUSION

Certainly, judges are entitled to a presumption of absence of bias, *see Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982), as well as one of integrity and honesty. *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. They are also entitled to a presumption that they will follow their duty to "be unswayed by partisan interests, public clamor, or fear of criticism." Haw.S.Ct.R. 8.5(a)(5), *incorporating* Code of Judicial Conduct, Canon 3(A)(1). But such a presumption "does not, of course, preclude a court from determining from the special facts

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(Continued from previous page)

district court's dismissal of a complaint on the basis of *Younger*, emphasizing that recusal would solve any due process problem that might arise from the possibility of bias on the part of individual members of the New Jersey Supreme Court. *Id.* *Kugler* involved an individual instance of bias, not the systemic bias present here. Because Rule 13 contemplates that the Hawaii justices will determine the question of ineffective assistance of counsel under that rule and not that they will all be recused from hearing such cases when the triggering determination has been made by the Hawaii Supreme Court, recusal is not an available option here. Thus, *Kugler* is inapplicable. In addition, this court has held that a plaintiff's failure to utilize state disqualification procedures will prevent us from making a determination whether his case fits the bias exception to *Younger*. *Flangas v. State Bar of Nevada*, 655 F.2d 946, 950 (9th Cir.1981). However, *Flangas*, like *Kugler*, involved an individual instance of bias to which the state recusal statute was clearly applicable.

and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470. This is just such a case. Under Rule 13, the Hawaii Supreme Court would be called upon to determine whether Partington rendered ineffective assistance of counsel, despite the fact that it has previously determined, in reversing a murder conviction, that he did precisely that. While I have no doubt that the justices of the Hawaii Supreme Court would attempt to comply with their duty to be impartial, the risk of prejudgment on the part of the court is too great. So, too, is the price the courts would pay for failing to preserve the appearance of justice.

The majority's suggestion that Partington must now present his arguments to a tribunal that has prejudged the merits of the disciplinary proceedings because he has not shown that the tribunal is biased on the issue of whether it is biased, misconceives the law of abstention. Partington has shown all that he need show in order to obtain a federal court injunction – he has shown that the state tribunal has prejudged the merits of the disciplinary proceedings. *See Gibson*, 411 U.S. at 577-78, 93 S.Ct. at 1697. I see no legal or practical reason for forcing Partington to first present his claims to the Hawaii Supreme Court.

Although the majority posits recusal of all of the justices as a possible solution to the prejudgment problem, it offers no support for the assumption that Hawaii's general recusal statute is applicable. In fact, the structure of Rule 13 compels the conclusion that this remedy is simply not available here. Rule 13 explicitly requires that the Hawaii Supreme Court adjudicate all cases arising

under the rule, not that the determination be made by an entirely different group of judges whenever the initial determination was made or affirmed by the supreme court.

For these reasons, the Hawaii Supreme Court simply cannot be said to provide Partington with an unbiased forum insofar as the disciplinary proceedings are concerned. Accordingly, *Younger* abstention is inappropriate.[33] I would reverse the district court's decision and remand the case to that court with instructions to enjoin the Rule 13 proceedings.

SANCTIONS

While I agree with the majority that sanctions against Chang and Gedan are appropriate, I cannot agree that Rule 11 is a proper basis for imposing them. Certainly, Rule 11 was not the basis the Seventh Circuit relied upon in *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421, 1422 (7th Cir.1988), a case the majority cites as precedent for its sanctioning of Chang and Gedan. The Seventh Circuit has made it abundantly clear that Rule 11 does not apply to proceedings before courts of appeals. *See, e.g., Leigh v. Engle*, 858 F.2d 361, 370 n. 5 (7th Cir.1988), *cert. denied*,

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[33] Because the Hawaii Supreme Court is biased for the reasons explained above, it is not necessary to decide whether it is also biased as to Partington's equal protection claim. Nevertheless, the April 27, 1987 letter to Partington from the Chief Justice strongly suggests that the Court has prejudged that issue as well. *See* note 11 *supra* and ER 446 (stating reasons that Rule 13 need not be applied to prosecuting attorneys as well as to defense attorneys).

___ U.S. ___, 109 S.Ct. 1528, 103 L.Ed.2d 833 (1989); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 306 n. 6 (7th Cir.1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir.1988).

The majority attempts to avoid this problem by stating that, unlike the Seventh Circuit, this circuit has adopted Rule 11 for proceedings before this court. However, the cases cited by the majority, *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304-05 (9th Cir.1987); and *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), when properly analyzed, do not stand for this broad proposition. Rather, in each of these cases, the objectionable conduct for which the attorney was sanctioned occurred in the district court.[34] Here, in contrast, the sanctionable conduct took place exclusively in the court of appeals: Chang and Gedan filed a frivolous motion for sanctions against Partington for bringing this appeal. I do not believe that we can properly adopt Rule 11 for appellate proceedings through the exercise of our decision making function. Rule 11 is applicable to actions taken in the district courts not the bankruptcy courts, *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir.1987); Fed.R.Civ.P. 81(a)(1), or the courts of appeals. *Leigh; Borowski; Hays*. If a rule similar or identical to Rule 11 is to be made applicable to federal appellate courts generally, an amendment to the Federal Rules of Appellate Procedure will be required. If, on the other hand, a

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[34] While *In re Curl* is at best ambiguous, it appears that the principal conduct the attorney was sanctioned for in that case was the filing in the district court of a frivolous notice of appeal.

judge of this court believes that our court should adopt such a rule for ourselves, he should request our Advisory Committee on Rules to act. However, even if we could extend Rule 11 to appellate proceedings, it would be unwise to do so. The satellite litigation we would be inviting is not worth the candle.

Of course, this still leaves the question of what the proper basis for our imposition of sanctions against Chang and Gedan should be. While *Meeks* did not make clear what basis the Seventh Circuit relied upon to grant sanctions, there are several options available to us: Fed.R.App.P. 46(c); 28 U.S.C. § 1927; or our inherent powers. Unwarranted sanctions motions serve to multiply proceedings unnecessarily and to harass one's opponent. Because I believe that Chang and Gedan's filing of a motion for sanctions against Partington for bringing this appeal was unreasonable and vexatious, I would impose sanctions pursuant to 28 U.S.C. § 1927.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 87-2375
	)
EARLE A. PARTINGTON,	) D.C. No.
Plaintiff-Appellant,	) CV-87-0172-KAY
	)
-vs-	) ORDER
	) DENYING
JOSEPH M. GEDAN;	) PETITION FOR
HOWARD T. CHANG,	) REHEARING
Defendants-Appellees.	)
	) FILED DEC 22 1989

Appeal from the United States
District Court for the
District of Hawaii

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

NO. 10041

IN THE SUPREME COURT
OF THE STATE OF HAWAII

	) CRIMINAL NO. 59285
	)
	) APPEAL FROM THE
STATE OF HAWAII,	) JUDGMENT;
	) NOTICE OF ENTRY,
Plaintiff-Appellee,	) FILED JULY 2, 1984
	)
vs.	)
	) FIRST CIRCUIT COURT
CLIFFORD M.M.	)
CLARKE, SR.,	)
	) HONORABLE
Defendant-Appellant.	) LELAND H. SPENCER
	) Judge
	)
	) FILED 1985 DEC 27

MEMORANDUM OPINION

This is an appeal from a conviction for murder in violation of HRS § 707-701. The victim was the infant child of appellant's live-in girl friend.

Appellant raises numerous grounds on appeal, none of which we reach or decide because, in our view, the record is clear that the appellant did not have the effective assistance of counsel at trial and that therefore we must reverse and remand for a new trial.

The State's case against the appellant rested on circumstantial evidence. It is apparent from the record that a possible defense, contemplated by appellant and his counsel, was that the actual culprit was the mother. At oral argument, appellant's counsel suggested that another possible defense was that, while appellant might

have inflicted the fatal abuse, he lacked the necessary intent to cause the child's death.

We are faced with a record in which appellant's trial counsel (1) refused to make an opening statement; (2) refused to cross-examine the mother of the victim, counsel's stated reason being that certain records with respect to the witness had not been made available to him; (3) subsequently refused to call the witness himself after the records were made available to him;[1] (4) elicited testimony from two prosecution witnesses that they believed that the appellant was guilty; and (5) refused to make a closing argument.

At oral argument, appellant's counsel asserted that each of the above decisions was justifiable as a matter of tactics. We cannot agree. In our view, on this record, none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases. *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). The effect was to substantially impair what defenses appellant had. *Antone, supra.*

We remind both counsel of their obligations under HSCR 13 once a judgment on appeal has been issued by us in this case. Reversed and remanded.

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[1] Under HRE 607, counsel could have impeached her testimony.

DATED: Honolulu, Hawaii, December 27, 1985.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank Padgett
/s/ Yoshimi Hayashi
/s/ James Wakatsuki

Earle A. Partington
(Schweigert & Associates
of counsel) for appellant

Emlyn H. Higa,
Deputy Prosecuting Attorney,
for appeliee

APPENDIX D

HAWAII SUPREME COURT RULES

Rule 13 – PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.

Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master,

he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1531

In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure by Petitioner in No. 89-1531 actually to "file" his petition for rehearing in the Court below on or before the fourteenth day after judgment in the Court of Appeals, as is required by Fed. R. App. P. 25(a) and 40, renders his petition for review here jurisdictionally untimely in that the petition for rehearing timely filed by Petitioners in No. 89-1506 (Respondents here) on the fourteenth day after judgment below was addressed to the collateral issue of attorneys fees?

2. Whether, assuming Petitioner has timely invoked this Court's authority, Petitioner's claims arising out of attorney disciplinary proceedings commenced against him pursuant to Rule 13 of the Supreme Court of Hawaii were correctly held to be subject to dismissal under the precepts of comity, federalism, and restraint reflected in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, *e.g., Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), or whether certiorari should be denied, or the judgment affirmed, on the basis of the more fundamental reason that such claims are not ripe for federal review?

3. Whether the claims presented in No. 89-1531 are barred by the independent and adequate state ground doctrine?

4. Whether, assuming, *arguendo*, the dispositions in the state courts of which Petitioner here complaints are "final," Petitioner's exclusive avenue of federal review is by way of petition under 28 U.S.C. § 1257, and not by a

QUESTIONS PRESENTED – Continued

"horizontal appeal" to the inferior federal courts of the United States, or, if not, whether the principles of the Full, Faith, and Credit Act, 28 U.S.C. § 1738 (1982), prohibit departure in this case from the law of the case, if any, developed in the state courts?

5. Whether any substantial federal question is presented by Petitioner's claim that the highest court of a state is unconstitutionally biased for purposes of attorney disciplinary proceedings on the basis of rulings in favor of Petitioner's past client in a criminal case where Petitioner was not a party?

6. Whether any substantial federal question is presented by Petitioner's claim that the Due Process Clause, *per se*, bars a State from granting an incentive for criminal defense counsel to reveal client confidences so as to defend themselves against allegations of impropriety, and whether, if so, Petitioner's former client's free and open waivers of the attorney client privilege moot federal protection of the confidences at issue?

7. Whether any substantial federal question is presented by Petitioner's prayer for relief from statements in a judicial opinion that, assertedly, defame one of the lawyers in the case?

8. Whether for any other reason review should be denied?

PARTIES IN THIS COURT

Petitioner in this Court Earle A. Partington, Esq., is a Honolulu attorney. He is plaintiff and appellant in the courts below, and a Respondent in No. 89-1506 (U.S. pet. for cert. filed Mar. 22, 1990), along with the Hawaii Association of Criminal Defense Lawyers, an amicus curiae without standing to appeal the judgment below. Pet. for Cert. at ii, No. 89-1506.

Respondents on this Petition, No. 89-1531, include Joseph M. Gedan, the Rule 13 Special Master in proceedings docketed in the Supreme Court of Hawaii variously as *In re: Earle A. Partington* (Haw. Spec. Master filed 1986), or *State v. Clarke*, No. 10041 (Haw. Spec. Master filed 1986). Special Master Gedan is a defendant in the district court and an appellee in the appeal below, which sought solely equitable relief. Because the relief ultimately sought against Respondent Gedan was equitable in nature, Respondent Gedan submits he has been named as a Respondent in this Court in his official capacity, although he appears in whatever capacity he is in fact so named. Pet. for Cert. at ii, No. 89-1506 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985))). The Petition in No. 89-1531 also names Howard T. Chang, prosecutor in the Rule 13 proceedings, and a defendant-appellee below, as a Respondent. Respondent Chang appears here as does Special Master Gedan. On February 23, 1990, Rule 13 Prosecutor Chang was succeeded by Mark J. Bennett, who ought to be substituted automatically under this Court's Rule 35.3.

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No. 89-1531

In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Joseph M. Gedan, Special Master appointed by the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Feb. 3, 1986), *et al.*, officers of the State of Hawaii ("State officials"), and Petitioners in No. 89-1506 (U.S. pet. for cert. filed Mar. 22, 1990), pray that the petition for writ of certiorari in No. 89-1531 be denied, or that on any review given, that the judgment below favorable to the State officials be affirmed.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 880 F.2d 116 (9th Cir. 1989), and is reprinted in the appendix to Petitioner Earle A. Partington's Petition for Certiorari, No. 89-1531 ["Pet. App. (No. 89-1531)"] as Appendix ["App."] "A" and in the Appendix to the State officials' Petition for Certiorari, No. 89-1506 ["Pet. App. (No. 89-1506)"] also as Appendix ["App."] "A." The order of the United States District Court for the District of Hawaii, granting, *inter alia*, the State Officials' motion to dismiss, is reprinted at Pet. App. "C" (No. 89-1506). The unreported Memorandum Opinion of the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), is reprinted in Pet. App. "D" (No. 89-1506). Other orders of the Supreme Court of Hawaii or the Hawaii Rule 13 Special Master, dated December 6, 1984, and January 26, February 1, February 12, and February 27, 1990, are reprinted in the appendix to this opposition ["Resp. App. (No. 89-1531)"] as App. "C," "E," "F," "H" and "I," to assist the Court in evaluating No. 89-1531. See this Court's Rule 15.1.[1]

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[1] The Order of the Supreme Court of Hawaii dated December 6, 1984, appears in the record below as part of Exhibit "B" to the Complaint, No. 87-0172 (D. Haw. filed Mar. 9, 1987) (Clerk's Record ["C.R."] 1). The remaining orders, which were issued after the denial of rehearing by the court below on December 22, 1989, *see* Pet. App. "B," No. 89-1531, are for that reason not in the record in this action, but are properly tendered to this Court if, contrary to Respondents' arguments, *infra* (citing *e.g.*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 (1987)), post-filing events are relevant to this Court's review here.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit affirming the District Court's dismissal, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, was entered March 13, 1989. A timely petition for rehearing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit in San Francisco, on March 27, 1989, by the State officials, seeking reversal only of attorneys fees award against them in the court below. *See* Pet. App. 216-32 (No. 89-1506). A petition for rehearing, and suggestion of the appropriateness of rehearing *en banc*, dated March 27, 1989, was untimely filed in the court of appeals on March 29, 1989, sixteen days after judgment. *See* Fed. R. App. P. 25(a); 40. Both petitions and the suggestion for *en banc* review were denied by the court of appeals on December 22, 1989. *See* Pet. App. "B," No. 89-1531.

Despite the untimeliness of Partington's petition for rehearing in the lower court, the timeliness of the State officials' petition for rehearing may well render the petition for certiorari in No. 89-1531 timely under 28 U.S.C. § 2101 and this Court's Rule 13.4. *See Missouri v. Jenkins*, No. 88-1150, 58 U.S.L.W. 4480, 4484 (U.S. Apr. 18, 1990); R. Stearns, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.3 at 313 (construing former Rule 20.4 of this Court). However, the issue is not free from doubt. Strictly speaking, the State officials' Petition for Rehearing below did not seek to alter the "judgment" of the court of appeals in Petitioner's appeal, but rather was addressed to an issue " '[c]ollateral to' " and " 'separate from' the decision on the merits." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (citations omitted). As this

Court recently reaffirmed, the practice of suspending the finality of a lower court judgment "does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court." *Jenkins*, 58 U.S.L.W. at 4483 n.13. This rule would appear to apply a fortiori here, as the State officials did not seek any correction of the judgment of affirmance entered below (and, indeed, were entirely satisfied with that judgment). If the Court concludes that the State officials' petition for rehearing below does toll the time both for the State officials and for Petitioner here, however, the Petition here, like that in No. 89-1506, having been filed within 90 days of the denial of rehearing below, is timely under 28 U.S.C. §§ 1254(1) and 2101(c). As will be briefed below, despite its arguable timeliness, the Petition in No. 89-1531 also contains substantial defects under Article III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . .

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . .

Section 1738 of Title 28 of the United States Code provides in relevant part that

> The records and judicial proceedings of any court of any . . . State [of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

Section 2111 of Title 28, United States Code, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Article I, section 14, of the Hawaii Constitution of 1978 provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for the accused's defense.

Hawaii Supreme Court Rule 13 is reprinted in Pet. App. "D" (No. 89-1531) and in Pet. App. "E" (No. 89-1506).

STATEMENT OF THE CASE

As stated in our petition in No. 89-1506, this case arises out of the application by the courts below of the rule laid down almost two decades ago in *Younger v. Harris*, 401 U.S. 37 (1971). Reflecting this Nation's commitment to maintaining "the comity between the States and the National Government" and avoidance of "unwarranted determination of federal constitutional questions," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987), the *Younger* doctrine takes as its starting point the premise that "[c]ertain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. Since its announcement, *Younger* dismissal has been held applicable in numerous cases. While not all such expansions have been met with total approval, *Younger*'s extension to suits seeking to restrain state attorney disciplinary proceedings "within the jurisdiction of the appropriate State Supreme Court" (*see Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 627 (1986)), has this Court's unquestioned support. *See Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *id.* at 438 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.).

This Court's rulings make clear that *Younger* concerns are at their zenith when state courts have not been given the chance to pass on federal claims. Thus, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate

remedy, in the absence of unambiguous authority to the contrary." *Pennzoil*, 481 U.S. at 15. Indeed, the requirement that a federal plaintiff show "state procedural law bar[s] presentation of [its] claims," *Moore v. Sims*, 442 U.S. 415, 432 (1979), is an established one, which traces its origins to principles dating back over 185 years, and which have "for so long been applied by this Court that [they are] beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C.J.)). In this case, the district court, backed by findings that Petitioner's evidence "fail[ed] to create even an inference of prejudice" against him by the Supreme Court of Hawaii, *see* Pet. App. 88 (No. 89-1506), and the court of appeals, on review of the district court's dismissal, concluded that these principles prohibited Petitioner's attempt to restrain, as in *Middlesex*, ongoing state attorney discipline proceedings, particularly where, as in *Moore* and *Pennzoil*, appropriate and sufficiently protective avenues for litigating federal issues had not yet been exhausted in the state courts. Whether, having been dismissed by both courts below, Petitioner has raised any substantial basis for overturning these exercises of restraint is the main issue here.

A. Background of the Litigation; Supreme Court of Hawaii Rule 13 and the Protections Available to Respondent Counsel.

This case arises from the paradox created by the Sixth Amendment mandate that an indigent "accused shall enjoy [not only] the right . . . to have the Assistance of Counsel for his defense," but " 'the right to the *effective*

assistance of counsel.' " *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* Haw. Const. art. I, § 14; *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). Because of the vexing reality that a defendant may "win by losing," and Hawaii's "legitimate wish" "that [its] judgments remain intact on appeal," *Wheat v. United States*, 486 U.S. 153, 161 (1988), the Hawaii Supreme Court in 1984 promulgated a rule intended properly to deter and remedy the unnecessary generation of "ineffective assistance" errors.

Rule 13 provides for the commencement of a Special Master's inquiry and recommendation "[w]here the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final[.]" Haw. S. Ct. R. 13 (Pet. App. 88 (No. 89-1531)). The Rule requires appointment of a master "to determine whether action against the counsel alleged to have been incompetent is warranted" (*id.* ¶2), and authorizes avenues for raising of defenses by the respondent "why corrective action . . . should not be taken," appointment of a Rule 13 prosecutor, discovery, evidentiary hearing, recommended decision, and review in the Supreme Court of Hawaii (*id.* ¶¶2-9). Review is also available under the all-writs power, Haw. Rev. Stat. §§ 602-5(6) & (7).

For several reasons, both evident on the face of the rule, and from other provisions of Hawaii law, the decision of all issues by the Special Master, including the underlying issue of ineffective assistance, is *de novo*. The Rule expressly treats a respondent attorney as having been only "alleged to have been incompetent," and grants the Special Master (and the Supreme Court) the express

authority to dismiss the proceedings for any reason "why corrective action . . . should not be taken" (Rule 13 ¶¶4, 7 (Pet. App. 88-89 (No. 89-1531)). These include the claim that ineffectiveness did not occur (or, relatedly, was in fact "caused" by a judge or prosecutor). Under settled Hawaii preclusion principles, the triggering finding of ineffectiveness has no bar, merger, issue preclusive, or law of the case effect, particularly when reversal occurs on a direct appeal. This is true as a respondent attorney could not possibly be in privity with his former client on the ineffectiveness issue. *See Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1982) (per curiam); *cf. Martin v. Wilks*, 109 S. Ct. 2180, 2185 (1989) ("party seeking a judgment binding upon another cannot obligate that person to intervene"). A fortiori, any federal reason why sanctions may not issue may be advanced to the Master. *See id.*

Hawaii law also makes clear that the respondent attorney is not required to respect the confidences of his former client. Under DR 4-101(c), *codified at* Haw. S. Ct. R. 2.2(a) (1984), the respondent lawyer "may reveal . . . confidences or secrets necessary . . . to defend himself against an accusation of wrongful conduct." No Hawaii case, moreover, limits this "self-defense" exception to the attorney client privilege to instances where the client charges that the lawyer's conduct is wrongful.

The Rule permits full review of the master's report in the Supreme Court of Hawaii. *See* Rule 13, ¶10 (Pet. App. 90 (No. 89-1531)). The state court retains full discretion to order "dismissal of the proceedings" (*id.*), and, under Hawaii law, it is clear that the Supreme Court may consider any federal claim why remedial measures ought be

denied, even if the Master may not. *HOH Corp. v. Licensing Board*, 736 P.2d 1271 (Haw. 1987).

So understood, Rule 13 closely and compellingly serves interests at the heart of Hawaii's criminal justice system. The Rule's overriding purpose is to protect criminal defendants who are in fact innocent, but whose defenses are not believed (or not advanced at all) on account of their counsel's ineffectiveness. In this critical way, the Rule reflects the state court's commitment "to enforce the Supreme law of the land." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). The Rule "stands as a disincentive for competent attorneys" to turn criminal trials " 'into reversible trials,' " *State v. Smith*, 68 Haw. 304, 313-14, 712 P.2d 496, 502 (1986), and, by recognizing that "the law" includes a defendant's own rights, confirms that "counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

B. The Rule 13 Proceedings Here and Proceedings in the United States District Court.

Late in 1985, the Hawaii Supreme Court triggered the filing of a Rule 13 case against Petitioner Earle A. Partington, a Honolulu lawyer, by finding on direct appeal that Clifford Clarke was denied effective assistance of counsel by Partington's representation at Clarke's murder trial in 1984. *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (Pet. App. 86 (No. 89-1531)).

Though Partington, as appellate counsel, had not included trial ineffectiveness in the Opening Brief in

Clarke, he did inform the appellate court prior to argument that the state trial judge had complained to the Office of Disciplinary Counsel about his failure to make a closing argument, and moved, on Clarke's behalf, for a remand to the trial court "for the limited purpose of holding a hearing on the competence of [Clarke's] present attorney at the trial." Motion to Remand, No. 10041 (Haw. Nov. 9, 1984), Resp. App. 6 (No. 89-1531).

The trial judge's complaint, brought to the attention of the Hawaii Supreme Court by Clarke's motion, stated that "by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a 'waste of time', Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction." Letter from Leland Spencer to Office of Disciplinary Counsel (Aug. 1, 1984), at 3, Exh. "B" to Complaint, No. 87-0172 (D. Haw. filed Mar. 9, 1987), Clerk's Record 1, Resp. App. 16 (No. 89-1531), *infra*. According to the partial transcript attached to the court's letter, also presented to the Supreme Court of Hawaii, at the time closing was to be given, and with the record reflecting the presence of the jury, Partington had stated that "in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time." Tr. at 2, Cr. No. 59285 (Haw. Cir. May 24, 1984), Resp. App. 19 (No. 89-1531). The Supreme Court of Hawaii was also informed of a letter Clarke wrote to the Hon. Robert Won Bae Chang, a judge of the Hawaii Circuit Court for the First Circuit

(Hawaii's trial court of general jurisdiction), after Partington provided Clarke with the trial judge's disciplinary complaint. While accusing the trial judge of bias, Clarke in that letter, noted that the trial judge had "also charged my Attorney for not making a closing argument at the end of my trial" Resp. App. 21 (No. 89-1531). Clarke then stated:

> At that time my Attorney Earl[e] Partington suggested to me for not making a closing argument as a tactic to find pitty from the Jury at that time. I agreed because I didn't fully understanding [sic] court procedure and tactic.
>
> Now I feel that I made the wrong decision in agreeing with my lawyer.
>
> Because I did want a closing argument, but took my lawyer's advice.

Letter from Clifford Clarke, Sr., to the Hon. Robert Won Bae Chang, dated Oct. 30, 1984, attached to Letter from Petitioner to Clerk, Circuit Court of the First Circuit, C.R. No. 59285 (Haw. Cir. Nov. 2, 1984), Exh. "B" to Motion to Remand, No. 10041 (Haw. Nov. 9, 1984), Resp. App. 21 (No. 89-1531).

Acting on the motion for remand, the Supreme Court of Hawaii on December 6, 1984, denied remand "without expressing an opinion on the issue of effective assistance of counsel." Order, No. 10041 (Haw. Dec. 6, 1984), Resp. App. C (No. 89-1531). On December 27, 1984, after hearing argument, the Court, exercising its right to "apply [its] plain-error rules," *Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982), acted on the reserved issue of trial counsel's effectiveness, and vacated the conviction. Pet. App. C (No. 89-1531). The court thus found Partington ineffective

because he (1) did not make an opening statement; (2) did not cross-examine the victim's mother ostensibly because the State did not make available records concerning her; (3) did not call the mother after receiving the records; (4) elicited testimony from two State witnesses that they thought Clarke was guilty; and (5) did not make closing argument. *See id.*; 880 F.2d at 118, Pet. App. at 3 (No. 89-1531). Following the judgment of vacatur, Rule 13 proceedings were commenced in February 1986 with the appointment of Joseph M. Gedan as Special Master. *See* 880 F.2d at 119, *id.* at 8. Partington filed an answer asserting that his decisions in *Clarke* were based on legitimate trial tactics, but that the attorney-client privilege barred him from revealing the basis therefore. *Id.* Howard T. Chang was appointed Rule 13 Prosecutor in August, 1986. *Id.* Clarke, having never sought in his appeal outright reversal of his conviction, but at most only a new trial (Resp. App. 4 (No. 89-1531)), did not seek this Court's review, nor did Partington seek leave to intervene for appeal purposes.

On March 9, 1987, while the Rule 13 proceedings were fully pending (albeit behind the schedule identified in Rule 13), Respondent Partington filed the action below in the United States District Court for the District of Hawaii, seeking an injunction prohibiting the State officials from proceeding against him under Rule 13 and a declaratory judgment that Rule 13 is unconstitutional. 880 F.2d at 119-20, Pet. App. 8-9 (No. 89-1531).

In his suit, Partington asserted that the pendency of the Rule 13 case violated his rights under the First, Fifth, and Sixth Amendments, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause. *Id.*

at 119. On July 1, 1987, the District Court, Kay J., granted Petitioners' motion to dismiss, or for summary judgment, under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny (Pet. App. 86-87 (No. 89-1506)).

Citing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the court rejected Partington's suggestion "that the Hawaii Supreme Court has prejudged this case," and found the absence of "even an inference of prejudice" (Pet. App. 88 (No. 89-1506)). The court rejected the claim that *Withrow v. Larkin*, 421 U.S. 43 (1976), forbade dismissal (Pet. App. at 88-89 (No. 89-1506)), and noted Partington did not argue that Rule 13 "is 'flagrantly and patently' unconstitutional" so as to counsel against dismissal (*id.* at 90). Having so found, the court rejected Partington's summary judgment motion (*id.*).

C. Proceedings in the United States Court of Appeals.

On appeal,[2] a divided Ninth Circuit panel (Wallace, and Noonan, JJ.), affirmed, reasoning that Partington's challenge was "strikingly similar" to that in *Middlesex*. In response to Petitioner's two main arguments why *Younger*'s familiar three-part test was not met, namely, that "the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel" and that "both the special master and the Hawaii Supreme Court are biased against him," 880

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[2] A more complete recitation of the arguments on appeal is presented at pp. 11-14 of the Petition in No. 89-1506. Because of the limited grounds on which Partington seeks review, a shorter summary of the argument below is provided here.

F.2d at 123, 124, Pet. App. 17, 20 (No. 89-1531), the court of appeals reasoned that, under *Pennzoil* and other authority, Partington's challenge to the adequacy of the State proceedings for *Younger* purposes failed on its face. 880 F.2d at 122, 123-28, Pet. App. 15, 16-30 (No. 89-1531). The majority rejected any claim that the state proceedings were animated by "bad faith" and dismissed claims that Rule 13 was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *id.* 128-29, Pet. App. 30-32, and denied as not properly raised the claim that the *Clarke* reversal's asserted immediate defamatory impact made abstention inapt. *id.* 129-30, Pet. App. 32-33.[3]

Judge Noonan concurred and filed a separate opinion comparing the law of statutory recusal that controls the proceedings in the federal courts. 880 F.2d at 131-38. Judge Reinhardt dissented on the ground that because "the Hawaii Supreme Court, *sua sponte*, raised *and decided*, on the merits, the issue of ineffective assistance of counsel in a manner adverse to [Partington,]" the state court, in any subsequent review of a recommendation from the Special Master, would not be, "as a practical matter, an unbiased adjudicator." 880 F.2d at 140, Pet. App. 61 (No. 89-1531). Although the record in the Rule 13 action might be substantially different than in the *Clarke* appeal, and

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[3] Having affirmed the dismissal below, the two-judge majority nonetheless imposed "Rule 11" sanctions against the State officials for seeking their appellate damages under Fed. R. App. P. 38. *See* Pet. for Cert. at 14-16 (No. 89-1506). Judge Reinhardt concurred in the sanctions, but on other grounds. *See* Pet. App. 82-83 (No. 89-1531).

indeed might never reach the Supreme Court if the Special Master found, for example, that Partington's actions were legitimate responses to the trial judge's rulings in *Clarke*, Judge Reinhardt reasoned that, since it would be "logically inconsistent" for the state court to find that Partington was not "ineffective" in light of *Clarke*, the proceedings could not be cured by a timely motion for recusal, as a panel recusal "would be directly contrary to the disciplinary system the Hawaii Supreme Court actually intended." Pet. App. 68, 77 (No. 89-1531).

After petitions for rehearing were filed, the Supreme Court of Hawaii decided *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989), a post-judgment proceeding under Rule 40, Hawaii R. Penal P., which in the circumstances of that case, involving a criminal conviction that had survived direct review, held that it would be "unfair" to initiate a Rule 13 proceeding without allowing the attorney accused of ineffectiveness to be heard first. This decision was called to the court's attention by Partington under Fed. R. App. P. 28(j). In November, 1989, the Hawaii Supreme Court also amended Rule 40 to provide that in postconviction proceedings where ineffectiveness of counsel is raised, the attorney accused of ineffectiveness shall be given notice and an opportunity to be heard. This matter, however, was not raised below by any party. On December 22, 1990, the court denied all rehearing petitions and rejected Petitioner's request for en banc review. Pet. App. "B," No. 89-1531.

D. Further Proceedings in the State Courts.

Following the denial of rehearing in the court of appeals, the Special Master issued an Order to Show Cause why the Rule 13 case should not proceed to a

hearing. *See* Resp. App. "F" (No. 89-1531). Partington did not respond formally to this Order, and, instead, filed a motion, in the Supreme Court of Hawaii, in the nature of mandamus, seeking dismissal of the Rule 13 proceedings with prejudice and recusal of the justices on the basis of the state court's asserted "institutional bias" and the "utter futility" of the Rule 13 proceeding in light of Clarke's purported assertion of the attorney/client privilege. *See* Resp. App. "D" (No. 89-1531). On January 26, 1990, the Supreme Court of Hawaii, per its acting Chief Justice, denied the motion "without prejudice to any timely exceptions that may be filed, or other timely relief that may be sought, after the submission of the master's decision and proposed order[.]" Resp. App. "E". The Master entered further procedural orders and denied Partington's informal request for recusal. Resp. App. "F". On February 12, 1990, the Supreme Court of Hawaii denied, also as premature, a second motion to the Court in the nature of mandamus, seeking immediate disqualification of the Master and Rule 13 prosecutor, as well as further rulings as to the course of proceedings below, (Resp. App. "G" and "H"). The Special Master, despite this disposition, took notice of several of Partington's claims, and issued further rulings, for example, that the Rule 13 proceedings would be *de novo* as to all issues, and that the Rule 13 prosecutor shall have the initial burden of proof. Resp. App. "I" (No. 89-1531). On February 23, 1990, a new Rule 13 prosecutor was appointed, who has, since the petition was filed in No. 89-1531, obtained Clarke's express written waiver of the attorney client privilege for "all confidential communications" "concerning Mr. Partington's decision: 1) whether or not to make an opening statement, 2) whether or not to cross-examine or recall Debralin Arcala, and 3) whether or not to make a closing argument." Resp. App. "J" (No. 89-1531).

REASONS FOR DENYING THE WRIT

The petition in No. 89-1531 presents no issue meriting this Court's review, and should be denied. As shown already in the State officials' petition in No. 89-1506, taken seriously, the premises of Partington's federal attack on the ongoing Rule 13 proceedings at issue here require repudiation of not only settled abstention precepts but principles of restraint that are "beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

Although the asserted "Sixth Amendment" bar to Partington's "fair opportunity to litigate" has been marred by a waiver and standing defect from the beginning of this lawsuit, was not firmly pressed in the courts below, and in any case depends on reading the Sixth Amendment in ways the Court has rejected, *see Weatherford v. Bursey*, 429 U.S. 545 (1977), Clarke's recent waiver of the attorney client privilege eliminates any argument at the start, let alone any that could overcome *Younger*.

Likewise, Petitioner's "institutional bias" arguments, taken seriously, would wrongly weaken the rigorous standards that must be met to effect judicial recusal as a matter of federal constitutional law, *see Aetna Life & Casualty, Inc. v. Lavoie*, 475 U.S. 813 (1986), and, as the court below held, do not deal with *Younger*'s requirement that Petitioner "assert its state remedies [to eliminate bias] in a timely manner." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 n.16 (1987). The Petition never addresses this, and, in the end Petitioner's bias argument is simply the improper

suggestion that state judges "will not enforce the supreme law of the land," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.1 (1985).

Finally, while it is debatable whether Petitioner preserved his claim that the asserted immediate impact of *State v. Clarke* exempts this case from *Younger* dismissal, that claim plainly presents no basis for review as Petitioner faces no more than "the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution[.]" 401 U.S. at 46; *See also Paul v. Davis*, 424 U.S. 693 (1976).

In sum, while the Petition may "involve significant policy issues," they are not issues presenting any true conflict with this Court's precedents or with those of other federal courts, or which otherwise merit this Court's review. The court below, as to its judgment of affirmance, did not depart from accepted practice so as to justify exercise of this Court's supervisory power.

In fact, from abstention to *re judicata*, Petitioner's arguments, if granted, would rewrite long-settled law governing established relationships among the state and federal courts.

A. The Dismissal of Petitioner's Claims Under the Younger Doctrine Was and Remains Consistent with the Sixth Amendment.

Running throughout each of Petitioner's arguments why review should be granted is the novel argument that the mandatory dismissal required by straightforward application of the *Younger* doctrine is somehow overcome in Rule 13 cases, which are intended to *effect* the Sixth Amendment, on the basis that those proceedings *offend*

the Sixth Amendment. *See* Pet. for Cert. at 11, 12, 13, 14-16, 20-21. Perhaps none of the arguments in the Petition have less merit than this set of novel contentions, and, indeed, none of the judges below remotely suggested the Sixth Amendment issues Partington raises were, *Younger* aside, even "colorable" or "important." Pet. App. 32, 37-38 (No. 89-1531).

Partington's arguments, fairly stated, purport to raise two sorts of Sixth Amendment interests: (1) a purported "right of independence" of counsel (Pet. App. at 21); and (2) the asserted Sixth Amendment interest in client confidences (Pet. App. 14). For at least the following reasons, neither of these asserted interests in the slightest merits this Court's scarce resources.

As to the first asserted interest, it is dubious whether Partington has Article III or prudential standing. As to the former, the ineffective assistance issue in *Clarke* was at least arguably decided as a matter of *state* constitutional law as to which the federal standard enunciated in *Strickland v. Washington*, 466 U.S. 466 (1984), is not coterminous. Thus, even if, for "injury-in-fact" purposes, Partington now stands in the shoes the State would have worn had it sought review in *Clarke*, it is dubious whether any federal court had authority over the State's interest in the so-called "presumption of effectiveness." *See Michigan v. Long*, 463 U.S. 1032 (1982). As to the latter, while on occasion, this Court has recognized that counsel may assert their clients' rights, *see Department of Labor v. Triplett*, 58 U.S.L.W. 4388, 4390 (U.S. Mar. 27, 1990), here Clarke, as an indigent defendant provided appointed counsel, had no "due process right" to Partington's style of representation. *Id.* "Petitioner does not, nor could [he]

defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel." *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). Indeed, as Clarke raised no claim in his appeal that, if granted, would have required outright acquittal, Clarke himself would have had no standing to appeal to this Court under 28 U.S.C. § 1257 on the Hawaii Supreme Court's remand in *Clarke* on a "presumption of effectiveness" issue. Partington thus lacks standing. Indeed, Partington virtually admits he lacked standing to seek review of the *Clarke* ruling. *See* Pet. for Cert. at 22 n.28. If he lacked standing then, he lacks it now. *Compare ASARCO v. Kadish*, 109 S. Ct. 2037, 2045 (1989). In addition, although this Court has derived from the Sixth Amendment a sphere of autonomy reserved to defendants themselves to conduct their own defense, *see Faretta v. California*, 422 U.S. 806 (1975); *McKaskle v. Wiggins*, 466 U.S. 168, 178 (1984), this sphere of autonomy has never been extended to appointed counsel, and, indeed, it is clear that the State's "legitimate wish" "that [its] judgments remain intact on appeal," *Wheat v. United States*, 486 U.S. 153, 161 (1988), may override even defense strategies to which the client expressly and knowingly consents, a point that applies a fortiori to Clarke's equivocal acquiescence in Partington's actions.

Indeed, Partington's full forfeiture of any opportunity to argue before the petit jury, even for a conviction of a lesser included offense, raises serious doubts of Partington's effectiveness under any standard, even with a "presumption of effectiveness." *See Evitts v. Lucey*, 469 U.S. 387, 395 (1984); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963).

The main point here is that, even if *everything* above on this score is wrong, Partington's argument that he was *not* ineffective is *no* basis for avoiding abstention. Counsel's effectiveness must simply be decided in state court.

Partington makes no argument that the existence of Rule 13 is, on these Sixth Amendment grounds, " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be make to apply it,' " 401 U.S. at 53-54, *quoted*, Pet. App. 31 (No. 89-1531), and such an argument, if made, would plainly be frivolous. Likewise, it would border on the absurd to prohibit any inquiry into Partington's actions on the ground that there could be no "reasonable expectation" of determining that action under Rule 13's corrective standards was warranted. *See Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975).

Partington's contention relating to the Sixth Amendment's protections for attorney/client confidences likewise does not merit review. As an initial matter, this "Sixth Amendment" argument was not firmly pressed below, and, indeed, the Court of Appeals was generous to Partington in "interpret[ing]" Partington's privilege arguments as even addressing the "opportunity to litigate" prong of *Younger*'s familiar three-part test. *See* Pet. App. 18 (No. 89-1531). To the extent the Court of Appeals decided the "Sixth Amendment" issues below "without the benefit of briefing or argument" (Pet. for Cert. at 9), this defect can be laid squarely at Partington's door. The issue is not one provoking "plain error" review, *see Frisby v. Schultz*, 108 S. Ct. 2495, 2401 (1988), and certiorari is inappropriate.

Second, it is dubious whether Partington has any standing to assert Clarke's purported Sixth Amendment rights in his communications with Partington. Because Partington would be better off, *i.e.*, free of any "federal" limit on his right to dispute the charge of ineffectiveness if the Sixth Amendment were interpreted to permit disclosure of Clarke's confidences, Partington does not meet even the minimal "injury-in-fact" requirements of Article III. *See Caplin*, 109 S. Ct. at 2650. Partington is simply the wrong person to be asserting Clarke's Sixth Amendment interest in attorney/client confidentiality.

Third, contrary to Partington's arguments, the Sixth Amendment has never been interpreted to generate the *per se* bar on compelled disclosure of client confidences. So long as those confidences are not used against the accused, there is "no violation of the Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment." *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977); *cf. Michigan v. Harvey*, 110 S. Ct. 1176 (1990); *Michigan v. Jackson*, 475 U.S. 625 (1986).

Although Partington suggests cases where Rule 13 could be abused to generate improper coerced disclosure of client confidences for use in subsequent criminal trials (*see* Pet. at 16), these facts are not before the Court. The issue here, at most, is whether Rule 13 offers Partington an opportunity to "raise his constitutional claims 'and have [those claims] timely decided by a competent state tribunal.' " Pet. App. 16.

This being so, the Ninth Circuit was on more than solid ground in asserting that, at best, the issue here was whether "Hawaii's interpretation of the attorney-client

privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense." Pet. App. 18.

Although the Ninth Circuit suggested this as a procedural due process interest, it is doubtful whether the matter even rises to that level. As the Ninth Circuit observed in a related context, "[c]ourts have consistently rejected arguments that deprivation of evidence [due to a privilege] constitutes a denial of due process." *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1390 (9th Cir. 1986) (cases from three circuits).

As the Ninth Circuit held here however, what makes Partington's challenge to the Rule 13 proceedings against him plainly meritless is *Pennzoil*'s requirement that the attorney-client privilege must be shown by "unambiguous" authority to bar disclosure of the evidence Partington asserts he needs to defend himself. *See* 481 U.S. at 15. Partington does not even assert such authority, as a matter of state law, exists, and virtually concedes this issue. *See* Pet. for Cert. at 15.

If this were not enough, Partington's assertion that Clarke has "refus[ed] to waive the attorney client privilege" (*id.* at 14), has never been during this case's pendency, and, in any case, is not now, fully accurate. As noted, Clarke in 1984 revealed the tactical considerations leading to Partington's decisions, and, in any case, has now effected a broad waiver of the privilege. *See* Resp. App. 21, 54-59 (No. 89-1531). "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1984). This principle bars Partington's "Sixth Amendment" claim.[4]

B. Partington's Assertions of "Institutional Bias" are Wholly Insufficient to Overcome Dismissal.

Partington's claims of "institutional bias" (Pet. at 9-11) likewise do not merit review. Indeed, as noted in our petition in No. 89-1506, such unsupported challenges to the fairness of judges have often led to sanctions. *See McLaughlin v. Union Oil of California*, 869 F.2d 1039, 1047 (7th Cir. 1989); *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988); *INVST v. Chem-Nuclear Sys.*, 815 F.2d 391, 402-03 (6th Cir. 1987); *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985). In fact, taken to its conclusion, Petitioner's argument would render the Justices of this Court constitutionally disabled from hearing appeals challenging their past rulings. This could not be the law.

Petitioner's and Judge Reinhardt's heavy reliance on *Withrow v. Larkin*, 421 U.S. 35 (1975), is belied by this Court's remarks in *Aetna Life & Casualty Co. v. Lavoie*, 475 U.S. 813 (1986), in which the Court made clear that even a judge's "general frustration" with a class of litigants is "insufficient to establish any constitutional violation." *Id.* at 821. Indeed, as this Court observed in a related context,

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[4] Although this Court's procedure, in a case that has become moot pending appeal is to vacate the judgment and remand with instructions to dismiss the complaint, *see United States v. Munsingwear*, 340 U.S. 36 (1950), that disposition has already been effected under the *Younger* doctrine; thus, granting review even for the purpose of vacating and remanding is unnecessary.

depriving the state courts " 'of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity." *Smith v. Murray*, 477 U.S. 527, 535 (1986).

As recognized by the panel majority, Petitioner's argument that *Younger* could be overcome depends on two claims, both of which are incorrect, and neither of which is sufficient to overcome *Pennzoil*'s admonition that procedural inhospitality in the state courts must be demonstrated by "unambiguous authority." First is the contention that Rule 13 does not provide *de novo* review, a contention rejected not only by the Chief Justice of the Supreme Court of Hawaii's informal statements, *see* Pet. App. 26, but by the District Court, the Court of Appeals, *and* the Master. Insofar as these rulings, generous to Partington's claims, are reviewed "with great," *United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987), if not "rigid deference," *Posadas v. Tourism Co.*, 478 U.S. 328, 339 & n.6 (1986), Partington's arguments of procedural inhospitality seek only to infect these proceedings with the very sort of "plain error" that prompts reversal in this Court. *See Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988).

Given these standards of deference and restraint, nothing in *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989), or the recent amendments to Haw. R. Penal P. 40(f), which, at most, properly give more process to counsel whose trial strategies survive direct review, in the least alters the basis of dismissal. It is error to urge otherwise. *See Frisby, supra*. Likewise, Judge Reinhardt's assessment of the Justices of the Supreme Court of Hawaii simply ignores the findings by the District Judge, who by reason of his position has "special insights into local realities," *Withrow*, 421 U.S. at 58. Here, based on

Partington's own submission that the facts were not in dispute, Judge Kay found that "[t]he plaintiff's arguments fail to create even an inference of prejudice" (Pet. App. 88 (No. 89-T506)).

As to the second issue, as the panel properly found, what makes Partington's arguments of bias especially unmeritorious is Partington's failure properly to employ the state court recusal procedures that this Court held in *Kugler v. Helfant*, 421 U.S. 117 (1987), decided the same day as the reversal of preliminary relief in *Withrow*, provided the "procedural safeguards to guarantee that [state litigants] will not be denied due process of law." *Id.* at 128. Judge Reinhardt's suggestion that full-panel recusal is not contemplated under Rule 13 is simply wrong. By vesting authority to review Rule 13 recommendations in the Supreme Court of Hawaii, rather than in the three-member Intermediate Court of Appeals in Rule 13 cases referred pursuant to final order of the Supreme Court, Rule 13 simply assures that all Rule 13 cases in which review is needed are reviewed by a five member Court.

Particularly in light of *Pennzoil*'s requirement of "unambiguous" inhospitality in the state courts, the courts below were fully justified in finding that Partington enjoyed every necessary opportunity to litigate, and, if

Pennzoil remains the law, which it should, Partington has no basis for being in federal court.[5]

C. Partington's Challenges to the Asserted Immediate Impact of the Clarke Ruling Would Overrule Younger Itself and Do Not Merit Review.

Although Partington hints that the asserted immediate impact of the reversal in *Clarke* warrants exempting this case from *Younger*'s settled mandate, each of these arguments is predicated on the improperly imputed bias and procedural inhospitality that the Court of Appeals properly rejected, and which this Court, too, would be required to reject were review granted here.

Seen in this light, Partington's claim that review ought be granted to correct the Ninth Circuit's refusal to address his "immediate impact" argument is nothing less than a challenge to *Younger*'s main premise, namely, that "the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. Although the Ninth Circuit did not reach this argument, the Court of Appeals, the State officials submit, acted well within

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[5] Thus, even if this case is not viewed as of the day it was filed, *see Pennzoil*, 481 U.S. at 17, Partington's recent, but premature invocations of the state court's mandamus authority to effect, under state law, the recusal he has been denied by federal law (*see* Resp. App. 36, 49 (No. 89-1531)), are insufficient to overcome *Younger* abstention, as Partington "cannot escape *Younger* abstention by failing to assert [his] state remedies in a timely fashion." *Pennzoil*, 481 U.S. at 17 n.16.

its discretion in concluding that the issue had not been properly preserved below, insofar as Appellant's Opening Brief, contrary to Fed. R. App. P. 28 and Ninth circuit procedure, did not inform the Court specifically where the "immediate impact" argument was raised in the trial court. Our main point here is that "this Court reviews judgments, not opinions," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), and the order in *Clarke*, as to Partington, was not reviewable in the inferior federal courts under the *Younger* doctrine. Indeed, insofar as Partington has not been deprived of anything to which due process precepts attach, *see Paul v. Davis*, 424 U.S. 693 (1976); *FDIC v. Mallen*, 486 U.S. 230 (1988), and the state court has not "arrived at a final, definitive position regarding how it will apply the [law] at issue to the particular [conduct] in question," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985), review ought be denied because the dismissal below was required not just by the *Younger* doctrine, but by the more fundamental Article III requirement of a ripe controversy. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986), *on remand*, 887 F.2d 215 (9th Cir. 1989); *compare Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535-38 (3d Cir. 1988); *see also Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629 (1986) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment). As the Ninth Circuit suggested, Partington's "immediate impact" argument, like his remaining arguments, will be subject to review here under 28 U.S.C. § 1257 upon any final judgment in the Supreme Court of Hawaii on review of the Rule 13 case.

Petitioner was properly remanded to seeking federal review here "in the customary course." *Pennzoil*, 481 U.S. at 18.[6]

CONCLUSION

For the foregoing reasons, the writ in No. 89-1531 should be denied.

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Counsel for Respondents
(Petitioners in No. 89-1506)

[6] Minimal respect for Congress's prescribed avenues for review ought to require Partington to seek review of any adverse orders in the state courts pursuant to 28 U.S.C. § 1257. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Indeed, to any extent the denials of mandamus in the Rule 13 proceeding constitute "law of the case" adverse to Partington, they are entitled to at least deference in these proceedings, although they are subject to review pursuant to 28 U.S.C. § 1257. *Compare* 28 U.S.C. § 1738 *with Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988).

APPENDIX "A"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 APPEAL FROM THE JUDGMENT AND SENTENCE ENTERED ON JULY 2, 1984 FIRST CIRCUIT COURT HONORABLE LELAND H. SPENCER, JUDGE

FILED
1985 APR 29 PM 3:17
Sandra N. Yasui
CLERK SUPREME COURT

APPELLANT'S OPENING BRIEF*

[material deleted in printing]

I. THE TRIAL COURT ABANDONED ITS ROLE OF IMPARTIAL JUDGE AND ASSUMED THE ROLE OF PROSECUTOR IN THIS CASE AS WELL AS INTERFERED WITH THE APPELLANT'S ATTORNEY-CLIENT RELATIONSHIP.

On this issue Appellant relies on the cumulative effect of the trial court's conduct and rulings set out in A

*Addenda, tables and other material deleted in printing.

through F above combined with the following. At trial the State offered a photograph (State's Exhibit "5") and x-rays (State's Exhibit "13A-F", "14A-B", "15A-B") into evidence without having provided discovery. The trial court admitted the photograph and the x-rays ruling that failure to grant discovery is not a basis to exclude evidence (17 May 84 R.T. 42:17-44:25, 46:17-19; 21 May 84 R.T. 101:5-102:10). When the State offered two transcripts of the recorded interviews with Appellant's son, the trial court *sua sponte* and over Appellant's objection recessed into chambers where it edited the transcripts for the State determining what portions would be admissible (21 May 84 R.T. 87:10-22, 98:23-99:6).

A trial judge presiding over a trial has the obligation to maintain impartiality and fairness in the proceedings before him. *State v. Alfonso*, 65 Haw. 95, 98, 648 P.2d 696, 699 (1982). The trial judge must not violate the basic principle that the judicial and prosecutorial functions are separate and distinct and are not to be merged. *United States v. Jacquillon*, 469 F.2d 380, 387 (5th Cir.1972); *United States v. Marzano*, 149 F.2d 923, 926 (2nd Cir.1945). It is not the role of the trial judge who thinks the prosecutor inadequate to step in to the point where the jury will regard him as associated with the prosecution. *United States v. Cuevas*, 510 F.2d 848, 850 (2nd Cir.1975). Constantly restricting the defendant beyond any bounds of discretion while giving the prosecutor free rein is an example of a violation of the basic principle. *Killilea v. United States*, 287 F.2d 212, 217-218 (1st Cir.), cert. den. 366 U.S. 969, 81 S.Ct. 1933, 6 L.Ed.2d 1259, reh. den. 368 U.S. 872, 82 S.Ct. 64, 7 L.Ed.2d 73 (1961). And if a judge's conduct in a trial does not comport with the appearance

of justice, the conviction must be reversed. *United States v. Gigax*, 605 F.2d 507, 510 (10th Cir.1979).

The conduct of the trial judge throughout this case showed an extraordinary bias for the State. The prosecutor was given unbridled rein to offer evidence of dubious or no value and designed solely to show that the Appellant is truly a thoroughly rotten person. Non-compliance with the rules of discovery to the prejudice of the Appellant was repeatedly sanctioned by the trial court. Where the prosecutor did not know how to get in prior consistent statement evidence, the trial court *sua sponte* and over Appellant's objection took the transcripts which contained the statements and edited them for the State. Appellant's cross-examination of State's witnesses was repeatedly curtailed without cause and in the case of the alleged victim's mother it was blocked entirely unless Appellant's counsel wanted to cross-examine without the vital Family Court records relating to the mother's conduct with the alleged victim. And when Appellant's counsel sought to make an offer of proof in regard to these records, the trial court refused to accept the Family Court material in the record. This is but the tip of the iceberg in regard to the trial court's conduct. Only a full reading of the record can give a true flavor of the extraordinary bias of the trial court for the State.

Finally, notwithstanding the clear statement by Appellant's counsel that both he *and* Appellant felt that closing argument would be a waste of time and therefore would not be given (24 May 84 R.T. 40:5-41:22), the trial court said nothing at that time and then later complained against Appellant's counsel to the Disciplinary Counsel

for failing to make closing argument (R.242-244). Appellant's counsel was compelled by his ethical duty to advise Appellant of this complaint which obviously infringed on the attorney-client relationship as evidenced by Appellant's letter to the Circuit Court (R.241, 262-263). While Appellant recognizes that a judge has a duty to report attorney misconduct, here the trial court made no effort to inquire as to whether Appellant had knowingly and intelligently waived closing argument as a trial tactic. Instead, the trial court filed its complaint in ignorance of the facts and without regard to its consequences on the attorney-client relationship. Such conduct is evidence of the trial court's bias against the Appellant and in favor of the State. *Matter of Evans*, 411 A.2d 984, 996 (D.C.Ct.App.1980). In this case, the trial court had abandoned its judicial role and became a prosecutor. That rule of prosecutor continued even after trial in an effort to hinder Appellant's right to effective counsel on appeal.

VII. CONCLUSION

Appellant seeks the reversal of his conviction and a remand to the Circuit Court for a new trial.

DATED: Honolulu, Hawaii, April 29, 1985.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Appellant

APPENDIX "B"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	) CR. NO. 59285)) APPEAL FROM) THE JUDGMENT) AND SENTENCE) ENTERED ON) JULY 2, 1984)) FIRST CIRCUIT) COURT)) HONORABLE) LELAND H.) SPENCER,) JUDGE

FILED*
1984 NOV 9 PM 3:37
Eugene L. Sabado
CLERK SUPREME COURT

MOTION TO REMAND CASE TO CIRCUIT COURT FOR LIMITED PURPOSE OF HEARING ON COMPETENCE OF PRESENT COUNSEL

MOTION TO APPOINT SEPARATE DEFENSE COUNSEL FOR PURPOSE OF SAID HEARING

COMES NOW Defendant-Appellant, Clifford M. M. Clarke, Sr., by and through his court appointed attorney, Earle A. Partington, and respectfully moves this Honorable Court for an order remanding this case to the Circuit

*Certificate of service and other material deleted in printing.

Court for the limited purpose of holding a hearing on the competence of Defendant-Appellant's present attorney at the trial of this case, and to further appoint separate counsel for Defendant-Appellant at said hearing.

These motions are made pursuant to Rule 6 of the Rules of the Supreme Court of the State of Hawaii and is based on Hawaii Revised Statutes Chapter 8, the attached Memorandum of Points and Authorities, the attached Exhibits "A" and "B", the Affidavit of Counsel attached hereto, and the record and file in this case.

DATED: Honolulu, Hawaii, November 9, 1984.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	) CR. NO. 59285)) APPEAL FROM) THE JUDGMENT) AND SENTENCE) ENTERED ON) JULY 2, 1984)) FIRST CIRCUIT) COURT)) HONORABLE) LELAND H.) SPENCER,) JUDGE

AFFIDAVIT OF EARLE A. PARTINGTON

STATE OF HAWAII CITY & COUNTY OF HONOLULU	)) SS:)	

Earle A. Partington, being first duly sworn on oath, deposes and says the following:

1. I am the court-appointed attorney for the Defendant-Appellant both on this appeal and in the trial court below because my client is indigent and cannot afford to pay for counsel.

2. Defendant-Appellant is presently incarcerated at Oahu Community Correctional Center and has been so

incarcerated since his arrest on the murder charge for which he was convicted.

3. Because of the nature of the charge against Defendant-Appellant (murder of a three year old child) and the personality of Defendant-Appellant, my relationship with him has not been easy. Defendant-Appellant believes he is wrongly incarcerated for a crime he did not commit, and has often expressed impatience and dissatisfaction at my inability to get him out of prison.

4. This impatience has been aggravated by the delay in prosecuting this appeal, a delay caused by a delay on the part of court reporters in preparing the transcripts of the trial.

5. On August 6, 1984, I received from the Office of the Disciplinary Counsel a complaint made by the trial judge in this case, the Honorable Leland H. Spencer, concerning my handling of the trial, a complaint which I had filed in the Circuit Court (Exhibit "A").

6. Because of the seriousness of Judge Spencer's complaint, I felt duty bound to provide a copy of it to Defendant-Appellant. I further asked attorney Ray A. Findlay to speak to Defendant-Appellant and advise him in this matter which Mr. Findlay did.

7. On November 1, 1984, I received a letter from Defendant-Appellant addressed to Circuit Judge Robert Won Bae Chang asking for a hearing in the matter of my competency at trial. After discussion with Judge Chang I filed this letter with the Circuit Court (Exhibit "B").

8. In the meetings I have had with Defendant-Appellant as well as in the telephone conversations I have

had with him since I sent him a copy of Judge Spencer's complaint, I have found Defendant-Appellant challenging my competence to represent him in this matter. Recently Defendant-Appellant has repeatedly questioned the advice I gave him at trial citing Judge Spencer's complaint as proof that I did something wrong at trial. He is now suspicious as to whether I am adequately representing him in this appeal.

9. Judge Spencer's complaint has had the effect of seriously impairing my relationship with Defendant-Appellant and unless this matter is resolved I am uncertain whether I can effectively represent him in this appeal.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Earle A. Partington
EARLE A. PARTINGTON

Subscribed and sworn to before me
this 9th day of November, 1984.

/s/ John F. Schweigert
NOTARY PUBLIC, State of Hawaii
My Commission Expires: 3/14/88

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 APPEAL FROM THE JUDGMENT AND SENTENCE ENTERED ON JULY 2, 1984 FIRST CIRCUIT COURT HONORABLE LELAND H. SPENCER, JUDGE

MEMORANDUM OF POINTS AND AUTHORITIES

These Motions present a rather unusual situation. The trial judge below feels that Defendant-Appellant's present counsel did not adequately represent Defendant-Appellant at trial. The trial judge did not take any action at the trial nor did he wait until after the appeal was over and the attorney-client relationship terminated to take action. Rather he waited only until he was no longer involved in the case to complain to the Disciplinary Counsel thereby causing serious problems in the attorney-client relationship on appeal.

Either present counsel must be relieved (which presents serious due process problems) or a hearing must be held before further proceedings on appeal. Defendant-

Appellant seeks such a hearing and present counsel concurs in this in order to attempt to render harmless to the attorney-client relationship the damage this complaint has done. At such a hearing, Defendant-Appellant should have separate counsel from his present counsel, and it is requested that attorney Ray A. Findlay be so appointed.

DATED: Honolulu, Hawaii, November 9, 1984.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Defendant-
Appellant

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
1984 AUG 13 AM 11:38
H. SETO
CLERK

August 10, 1983

Clerk
Circuit Court of the First Circuit
Kaahumanu Hale
777 Punchbowl Street
Honolulu, Hawaii 96813

Re: *State v. Clarke*, CR. No. 59285

Dear Sir:

On August 6, 1984 I received from the Office of Disciplinary Counsel the enclosed copy of a letter of complaint by Judge Leland H. Spencer in the above-entitled case. Because this letter concerns the conduct of the above-entitled case, which is awaiting preparation of the Record on Appeal, I request that this letter of complaint with my cover letter be filed in the Circuit court records and included in the Record on Appeal for consideration by the Supreme Court in the appeal. This letter of complaint raises a serious issue, *inter alia*, as to whether the trial judge in this case is interfering in my professional relationship with my client as I am duty bound to disclose this complaint to my client.

Sincerely,

/s/ Earle A. Partington
Earle A. Partington
Attorney for Defendant-Appellant

Encl.

EAP:vs/ff87

cc: Defendant-Appellant
Prosecuting Attorney
Disciplinary Counsel

Circuit Court of the First Circuit
Judiciary Building
Honolulu, Hawaii
Chambers of the Third Division
August 1, 1984

DISCIPLINARY COUNCIL
1164 Bishop Street
Suite 600
Honolulu, Hawaii 96813

Gentlemen:

Re: *Earle A. Partington*

The case entitled, "State of Hawaii vs. Clifford M. M. Clarke, Sr.", Cr. No. 59285, was tried before me from May 7, 1984 to May 25, 1984. The defendant was charged with the murder of the child of his girlfriend.

The defense counsel, Earle A. Partington, chose not to cross-examine Debra Lynn Arcala, the child's mother and the State's key witness, because he lacked possession of Family Court records about the child and the mother which he felt he needed for purpose of cross-examination.

By way of background, the defense had shortly before trial filed a motion with the Family Court for production of the records and the motion was pending on May 18, 1984 when the defense had the opportunity to cross-examine the mother. The Court denied a defense request to continue the cross-examination until resolution of the motion in the Family Court. The Court reasoned that the defense had ample opportunity during the month preceding the trial to seek production of the Family Court records. The Court also reasoned that the defense would

have a later opportunity to call the mother as a hostile witness and to examine her with leading questions and to impeach her under Hawaii Rules of Evidence 607 and 611. In this regard, the Court ordered the mother to return for purpose of further testimony.

On May 23, 1984, the Family Court granted the defense motion and defense counsel was provided with Family Court records. Armed with the records, the defense again chose not to examine the mother even though the mother was present for purpose of further testimony.

At time for final argument, defense counsel made the following statement in open court in the presence of the jury:

> "Your Honor, in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time." (A copy of the transcript is attached.)

In my capacity as presiding judge in the above case, I am reporting Mr. Partington's conduct to you for your evaluation. In my opinion, his failure to give final argument and his statement in the presence of the jury that it "would be a waste of time" constituted inexcusable violations of the Code of Professional Responsibility in at least two respects.

First, by choosing to not argue his client's case to the jury, Mr. Partington failed in an extremely important respect to perform his duty to zealously advocate his client's interest.

Mr. Partington states that it would be a "waste of time" to argue the case to the jury, However, it is for the jury, not the attorney, to determine whether the State had

proved the defendant's guilt beyond a reasonable doubt. Mr. Partington's failure to at least argue that the State had failed to prove its case constituted a clear failure to perform his duty to zealously advocate his client's interest. His conduct is a violation of DR7-101 of the Code of Professional Responsibility.

Secondly, by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a "waste of time", Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction. This conduct is a flagrant violation of DR7-101 of the Code of Professional Responsibility.

An attorney must obey the rules of law, evidence, practice and procedure. Such rules do not permit an attorney to deliberately prejudice his client's case in order to force an appellate court to reverse an anticipated conviction. This type of trial conduct must receive a very severe sanction in order to prevent a repetition from the same attorney and to set an example and prevent such conduct from other attorneys.

By hindsight, I was remiss in not ordering Mr. Partington to give final argument on behalf of the defendant with the sanction of contempt if he refused. My failure in this regard should not affect your evaluation of his conduct under the code of Professional Responsibility.

I did not report this matter to you promptly after the verdict in the case because I wanted to wait until sentencing was completed, post trial motion time limitations had

expired and there was no possibility of further proceedings before me as a presiding judge.

I fully realize that you may not agree with my evaluation of Mr. Partington's conduct. The purpose of this report to you is simply to give you the opportunity to evaluate his conduct and take whatever action you deem appropriate.

Very truly yours,

/s/ Leland H. Spencer
LELAND H. SPENCER
Third Judge

LHS:tm

Attach.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	)	
	)	CR. NO.
vs.	)	59285
CLIFFORD M. M. CLARKE, SR.,	)	
	)	ORIGINAL
Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

held before the HONORABLE LELAND H. SPENCER, Third Division Presiding, on Thursday, May 24, 1984. Jury Trial.

APPEARANCES:

JANICE FUTA — For the State
-and-
EMLIN HIGA,
Deputy Prosecuting Attorneys
City & County of Honolulu
1164 Bishop Street
Honolulu, Hawaii

EARLE A. PARTINGTON, ESQ., — For the Defendant
Schweigert & Associates
Suite 200, 250 S. Hotel St.,
Honolulu, Hawaii

REPORTER: SUSAN M. ECKEL, C.S.R. #120
Official Court Reporter
First Circuit Court

Thursday, May 24, 1984 — 2:20 p.m.

(The clerk called the case.)

THE COURT: All right. The record will reflect the presence of all counsel, the defendant and the ladies and gentlemen of the jury.

Mr. Partington, you may give your answering argument.

* * *

MR. PARTINGTON: Your Honor, in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time.

No closing argument.

THE COURT: All right.

* * *

STATE OF HAWAII)
) ss
CITY AND COUNTY OF)
HONOLULU)

I, Susan M. Eckel, CSR #120, Official Court Reporter, do hereby certify that the foregoing pages complete a true and correct transcription of my stenographic notes in the above-entitled matter.

Dated this 23rd day of July, 1984.

/s/ Susan M. Eckel
OFFICIAL COURT REPORTER

FILED
1984 NOV -5 PM 2:11

B.CHO
CLERK

November 2, 1984

Clerk
Circuit Court of the First Circuit
Kaahumanu Hale
777 Punchbowl Street
Honolulu, Hawaii 96813

Re: *State v. Clarke*, Cr. No. 59285

Dear Sir:

I enclose a copy of a letter I have received from my client, the Defendant in the above entitled case. This was a letter sent by my client to me to forward to Judge Chang. After meeting with Judge Chang he concurred in my recommendation that this letter be filed as part of the record in the Clarke case. Therefore I request that Clarke's letter along with this cover letter be filed in *State v. Clarke*.

Sincerely,

/s/ Earle A. Partington
Earle A. Partington

EAP/jf/ff3
Encl.
cc: Prosecuting Attorney

EXHIBIT B

OCT. 30, 1984

Honorable Robert W.B. Chang.

I am writing this letter to you concerning my trial. I feel that I didn't get a fair trial because of Judge Leland Spencer being prejudice against me.

I have a copy of letter that was sent to my Attorney charging him in not representing me good during my trial.

Judge Spencer didn't give my lawyer ample time to cross examine Debralin Arcala, and making my lawyer use Ms. Arcala as a witness in my behalf.

Judge Spencer also charged my Attorney for not making a closing argument at the end of my trial.

At that time my Attorney Earl Partington suggested to me for not making a closing argument as a tactic to find pitty from the Jury at that time. I agreed because I didn't fully understanding court procedure and tactic.

Now I feel that I made the wrong decision in agreeing with my lawyer.

Because I did want a closing argument, but took my lawyers advice.

In the letter that I having in the matter of Judge Spencer I feel that Judge Spencer has been interfering with Client, Lawyer relation during the trial.

I would like to ask for a hearing in this matter.

I deeply appreciate a respond from you.

Thank You Very Much

Clifford M. M. Clarke Sr.

APPENDIX "C"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285

FILED

1984 DEC -6 PM 1:30
Eugene L. Sabade
CLERK SUPREME COURT

ORDER

Upon consideration of Appellant's Motion to Remand Case to Circuit Court for Limited Purpose of Hearing on Competence of Present Counsel and Motion to Appoint Separate Defense Counsel for Purpose of Said Hearing, and documents in support thereof, and it appearing that there is insufficient ground to grant leave to withdraw as counsel for Appellant Clarke under Hawaii Rules of Appellate Procedure 50,

IT IS HEREBY ORDERED that the motion to remand is denied, without expressing an opinion on the issue of effective assistance of counsel. It is unnecessary to rule on

the motion to appoint separate counsel, given the denial of the motion to remand.

DATED: Honolulu, Hawaii, December 6, 1984.

FOR THE COURT:

/s/ H. Lum
Chief Justice

[seal]

APPENDIX "D"

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)))))))	CR. NO. 59285

FILED*
1990 JAN 19 PM 3:53
Sandra H. Yasui
CLERK SUPREME COURT

MOTION TO DISMISS WITH PREJUDICE HSCR 13 PROCEEDINGS (IN NO. 10041), TO MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633) OR, IN THE ALTERNATIVE, FOR DISQUALIFICATION OR RECUSAL OF THE PRESENT JUSTICES AND RETIRED JUSTICE NAKAMURA AND FOR APPOINTMENT OF SUBSTITUTE JUSTICES TO CONSIDER WHETHER TO DISMISS WITH PREJUDICE HSCR 13 PROCEEDINGS (IN NO. 10041), TO MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633

*Certificate of service and other material deleted in printing.

COMES NOW Attorney Earle A. Partington *pro se* and respectfully moves this Honorable Court as follows:

1. to dismiss with prejudice the Hawaii Supreme Court Rule 13 proceedings initiated by the court against Attorney Partington (in No. 10041);

2. to modify the memorandum opinion of this court filed on December 27, 1985 (in No. 10041), by withdrawing all of the opinion after the first paragraph save and except the last sentence, with reads "Reversed and remanded."; and

3. to modify the memorandum opinion of the court filed on October 5, 1987 (in No. 11633), by the deletion of the words "because of the ineffective assistance of appellant's trial counsel" which appear in the second sentence of the first paragraph; or;

In the alternative for disqualification or recusal of the present justices of this court and retired Justice Nakamura and the appointment of substitute justices to consider whether;

1. to dismiss with prejudice the Hawaii Supreme Court Rule 13 proceedings initiated by the court against Attorney Partington (in No. 10041);

2. to modify the memorandum opinion of this court filed on December 27, 1985 (in No. 10041), by withdrawing all of the opinion after the first paragraph, save and except the last sentence, which reads "Reversed and remanded."; and

3. to modify the memorandum opinion of this court filed on October 5, 1987 (in No. 11633), by the deletion of

the words "because of the ineffective assistance of appellant's trial counsel" which appear in the second sentence of the first paragraph.

This Motion is made pursuant to Rule 27(a) of the Hawaii Rules of Appellate Procedure and Hawaii Revised Statutes § 601-7 and is based on the attached memorandum of points and authorities and the records and files in these cases.

DATED: Honolulu, Hawaii, January 19, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285

AFFIDAVIT OF DISQUALIFICATION

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	)	SS:

EARLE A. PARTINGTON, being first duly sworn on oath, deposes and says the following:

1. I am the former attorney for Clifford M. M. Clarke, Sr.; and I was wrongly adjudged to have rendered ineffective assistance of counsel by this court on December 27, 1985.

2. The present sitting justices of this court and retired Justice Nakamura have a personal bias or prejudice against me as demonstrated by the following facts:

> The present sitting justices and retired Justice Nakamura, by the decision of December 27, 1985, prejudged the ultimate issue of ineffective assistance of counsel without affording me prior notice or opportunity to be heard and after denying me a hearing on the issue of ineffectiveness when such a hearing was requested on this court by motion.

3. Joseph M. Gedan, the Rule 13 proceeding special master, has a personal bias or prejudice against me as demonstrated by the following facts:

> Gedan has a pecuniary interest, or at least the appearance of a pecuniary interest, in this matter by virtue of the monetary judgment I have obtained against him (and special prosecutor Howard T. Chang) in *Partington v. Gedan*, 880 F.2d 116, 131 (9th Cir. 1989).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Earle A. Partington
EARLE A. PARTINGTON

Subscribed and sworn to before me
this 19th day of January, 1990.

/s/ Melanie Morris
NOTARY PUBLIC, State of Hawaii

My Commission Expires: 10/5/93

[seal]

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Attorney Partington *pro se*, former counsel for Defendant-Appellant Clifford M. M. Clarke, Sr., was adjudicated by this court to have rendered ineffective assistance of counsel to Defendant-Appellant during trial. The issue of ineffectiveness was raised *sua sponte* by this court during oral argument on appeal. On February 3, 1986, this court appointed Joseph M. Gedan as special master to conduct proceedings under Rule 13, Hawaii Supreme Court Rules. On August 13, 1986, Gedan appointed Howard T. Chang as special prosecutor for the Rule 13 proceedings.

On January 11, 1990, an Order to Show Cause was filed wherein Gedan ordered Partington and Chang "to show cause . . . within ten (10) days of the date of this Order, why the hearing in [No. 10041] should not be scheduled to be held [on February 12, 1990]."

Having received Gedan's Order to Show Cause, Partington now moves the court to dismiss the Rule 13 proceedings and to amend its memorandum opinions in the

matter specified by the motion herein or, in the alternative, for disqualification or recusal of the present justices of this court and retired Justice Nakamura and for the appointment of substitute justices to consider whether to dismiss the Rule 13 proceedings and amend the court's memorandum opinions in the manner specified by the motion herein.

ARGUMENT

1. Institutional Bias

In a recent opinion issued by this court, it was held that an attorney must have "an opportunity to explain his side of the story" before a Rule 13 proceeding can be initiated. *Matsuo v. State*, 70 Haw. ___, ___, 778 P.2d 332, 335 (1989). Rule 13 is entitled: "Proceedings Following Final Adjudication of Ineffective Assistance of Counsel in Criminal Cases." *Id.* n.7. An adjudication of ineffectiveness "is premature," the court said, "unless trial counsel is given the opportunity to explain his reasons for [the trial decisions in question]." *Id.* at 335.

From *Matsuo*, then, it is clear that if the issue of ineffectiveness is raised, then the proper sequence of events is as follows: (1) counsel is given an opportunity to explain the reasons for the tactical decisions in question; (2) where appropriate, a finding of ineffectiveness is entered; (3) with the entry of such a finding, the Rule 13 proceedings commence. *Id.*

In this case, however, Partington was afforded neither notice nor opportunity to explain the reasons for his tactical choices at trial. Indeed, when Partington requested such an opportunity following the trial judge's

complaint to the Office of Disciplinary Counsel immediately after the appeal was taken, this court denied his request. Nonetheless, the finding of ineffectiveness was made, and this court referred the matter to Rule 13 proceedings. As a result, Partington was denied due process and, contrary to the guarantees of equal protection of the law, as set out in the Fourteenth Amendment to the United States Constitution and Article I, § 5, of the Hawaii Constitution, he was singled out for treatment different from other counsel whose effectiveness is at issue. In other words, the court in *State v. Clarke* created a procedure unique to Partington in that he was denied an opportunity to be heard prior to being adjudicated ineffective, while under *Matsuo v. State*, every other attorney who may be adjudicated ineffective is afforded prior notice and an opportunity to be heard.

Partington's being adjudicated ineffective was a nullity, for, in the court's own words, such a "determination . . . is premature" if counsel has not been given the opportunity to explain his decision. The instant Rule 13 proceeding, which is premised on an invalid adjudication of ineffectiveness, should not be allowed to go forward. The special master cannot vacate the unconstitutional and wrongful adjudication of ineffectiveness rendered by this court, and therefore Partington cannot be required to go through this meaningless proceeding. The utter futility of the Rule 13 proceeding is even more apparent when it is realized that Defendant-Appellant has invoked the attorney-client privilege, thereby silencing Partington and preventing him from defending himself at any proceeding. The attorney-client privilege is part of the right to counsel clauses of the Sixth and Fourteenth Amendments to

the United States Constitution and Article I, § 14, of the Hawaii Constitution. *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). Further only the client can waive the attorney-client privilege. *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459-60 (N.D. Cal. 1978); *see United States v. Esposito*, 436 F.2d 603, 606 (9th Cir. 1970). Defendant-Appellant flatly refuses to waive the attorney-client privilege.

The court's institutional bias in this case is clear because the court ordered the initiation of a Rule 13 proceeding upon a premature and unconstitutional determination of ineffectiveness.[1] A supreme court justice is disqualified from sitting in review of a case that would require the court to review the validity of an order previously made by him. *In re Estate of Beckley*, 31 Haw. 150 (1929). In the face of the clear institutional bias here, the

---

[1] Partington notes that Gedan has a financial interest in the case. *Partington v. Gedan*, 880 F.2d 116, 131 (9th Cir. 1989) (ordering Gedan and Chang to pay costs and attorneys' fees to Partington and amicus curiae). Consequently, Gedan is in a conflict of interest as the special master of the Rule 13 proceedings. *Thurston v. Allen*, 8 Haw. 391 (1892); Canon 3C(1), Code of Judicial Conduct; *see also* DR 5-101, Code of Professional Responsibility.

Partington also notes that, because of Chang's financial interest in the case, *Partington v. Gedan*, 880 F.2d at 131, Chang will be in a conflict of interest if he proceeds further as the special prosecutor in the Rule 13 proceedings. DR 5-101, Code of Professional Responsibility.

court must dismiss the Rule 13 proceedings and modify the memorandum opinions accordingly.

2. Personal Bias

In the alternative, Partington requests the disqualification or recusal of the present justices and retired Justice Nakamura, in accordance with the provisions of Hawaii Revised Statutes (HRS) § 601-7(b). Under *Beckley*, disqualification is mandated. The question of bias or other reason for disqualification must be settled before the Rule 13 proceedings actually commence. *In re Bouslog-Sawyer*, 41 Haw. 270, 274 (1956); *see* HRS § 601-7 (requiring the filing of affidavits "before the trial or hearing of the action or proceeding").

Following the disqualification or recusal of the justices, substitute justices should be appointed to consider the following: whether the adjudication of ineffectiveness was premature, and hence a nullity, for failure of the court to ascertain counsel's "side of the story" (*Matsuo v. State*, 778 P.2d at 335); whether the Rule 13 proceedings should therefore be dismissed; and whether the memorandum opinions should be modified as set out in this Motion.

CONCLUSION

For the reasons outlined above, the requested relief must be granted. Further, Partington respectfully requests prompt disposition of this Motion.

DATED: Honolulu, Hawaii, January 19, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

APPENDIX "E"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	

FILED
1990 JAN 26
EUGENE L. SABADO
CLERK SUPREME COURT

ORDER

Upon consideration of the "Motion to Dismiss with Prejudice HSCR Rule 13 Proceedings . . . , to Modify Memorandum Opinion[s] . . . or, in the Alternative, for Disqualification or Recusal of the Present Justices and Retired Justice Nakamura and for Appointment of Substitute Justices to Consider Whether to Dismiss . . . HSCR 13 Proceedings . . . " filed by Earle A. Partington, it appearing that the motion is premature,

IT IS HEREBY ORDERED that the motion is denied, without prejudice to any timely exceptions that may be filed, or other timely relief that may be sought, after the submission of the master's decision and proposed order to this court in No. 10041. (*cf.* penultimate paragraph of Supreme Court Rule 13.)

DATED: Honolulu, Hawaii, January 26, 1990.

FOR THE COURT:

/s/ Frank Padgett
Acting Chief Justice

APPENDIX "F"

PROCEEDINGS BEFORE THE SPECIAL MASTER

STATE OF HAWAII

IN RE: EARLE A. PARTINGTON	)	No. 10041
	)	Supreme Court
	)	Cr. No. 59285
	)	First Circuit
	)	Court
	)	State of
	)	Hawaii
	)	

FILED
1990 FEB 1 AM 9:02
Sandra Yasui
CLERK SUPREME COURT

ORDER

On January 11, 1990, the Special Master issued and caused to be served an Order to Show Cause requiring the parties hereto, Howard T. Chang, Esq., as Rule 13 Prosecutor, and Respondent Earle A. Partington, Esq., to file memoranda and accompanying papers by January 22, 1990, showing cause why the hearing in this proceeding required by Rule 13 should not be held at 9:00 a.m. on the first business day thirty (30) days following the entry of mandate in the United States Court of Appeals in appeal No. 87-2375, as to which rehearing was denied by the Court of Appeals on December 22, 1989. The parties were also requested to address other matters, denoted as follows:

> (1) the need and basis for discovery, if any; (2) the procedures the parties desire or believe they are entitled to re: filing of briefs and proposed findings and conclusions of law, or any other

> papers the parties deem required or proper, as to all matters raised by the parties hereto, including claims and defenses under the Constitutions of the United States and Hawaii, and any and all grounds why the Rule 13 proceeding should be dismissed; and (3) other matters the parties deem necessary for immediate ruling, including, but not limited to, the desire, or right, of the parties for an earlier or later hearing date.

Order to Show Cause at 1-2. The parties were directed to file their written responses in the Supreme Court of Hawaii in appeal No. 10041 in accord with the terms of the Order to Show Cause.

On January 16, 1990, Respondent Partington, stating he was representing himself in this proceeding, wrote a letter to this Special Master, stating that without responses from the Special Master to the six questions proffered by a letter dated March 19, 1987, from Respondent's then-counsel, Boyce R. Brown, Respondent did "not know how I can respond to your order." Respondent also suggested that, for this Special Master to proceed in the case would breach Code of Judicial Conduct Canon 3C(1) and § 601-7 of the Hawaii Revised Statutes (1985), based upon the judgment awarding certain attorneys fees in *Partington v. Gedan*, 880 F.2d 116 (9th Cir.), *reh. denied* (9th Cir. Dec. 22, 1989).

On January 19, 1990, Rule 13 Prosecutor Chang wrote a letter to this Special Master, stating that he had received a copy of the Respondent's letter, which had suggested as well that the judgment in No. 87-2375 disqualified Prosecutor Chang from continuing as Rule 13 Prosecutor. Prosecutor Chang stated that he had tendered the matter

of his continued representation to the Office of Disciplinary Counsel, and accordingly, was unable "to comply with the Order to Show Cause within the time required."

On January 22, 1990, Respondent Partington also wrote a letter to this Special Master, referring to Rule 13 Prosecutor Chang's intention not to respond to the Order to Show Cause, stated that Partington did not intend to respond to the Order.

On January 22, 1990, no papers as required by this Master's order were filed in the Supreme Court of Hawaii, although, on January 19, 1990, Respondent Partington filed a Motion to Dismiss the Rule 13 Proceedings and for other relief, which motion has since been denied by the Supreme Court without prejudice.

So the record will be complete, Respondent's letter of January 16, 1990, together with the enclosed letter dated March 19, 1987, Rule 13 Prosecutor Chang's letter of January 19, 1990, and Respondent's letter of January 19, 1990, are attached to this Order as Exhibits "A" and "B," and "C," respectively.

As an initial matter, communications with the Special Master by letter are, as a general rule, to be discouraged. If the parties desire relief or wish to be excused from an order of the Special Master, they should file a proper motion in this proceeding with the Special Master, or, if appropriate, with the Supreme Court of Hawaii. For these and other reasons, the questions in Mr. Brown's letter of March 19, 1987, were not, and are not at this time, responded to. The Special Master will provide appropriate guidance to the parties after briefing of the issues contained in Mr. Brown's letter and other matters.

Indeed, it was the purpose of the Order to Show Cause to allow schedules to be set, and preliminary matters decided, in accord with the parties' desires, and the law, to facilitate informed adjudication. Neither party, however, responded properly to the Order to Show Cause. In order to give guidance to the parties, and to allow this matter to be decided fairly, and expeditiously, the Special Master hereby rules as follows:

First, although no formal motion to recuse the Special Master has been filed, the Special Master will, under the circumstances, construe Respondent's letter of January 16, 1990, as a motion to recuse, and will deny the motion. The motion proceeds from the premise that the judgment in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), awarding certain attorneys fees for a defense of a motion under Fed. R. App. P. 38 in that appeal renders the Special Master personally interested in this proceeding. As respondent notes, if the federal Court of Appeals judgment awarding fees is allowed to stand on such further review as may be sought, all that remains is for the District Court "to fix the amount." Nothing the Special Master can do in this proceeding can affect the collateral federal award, and thus the Special Master has no personal interest in this Rule 13 case that would prevent him from fairly and fully judging Mr. Partington's claims, or that would create an appearance of impropriety warranting recusal. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Sussel v. City and County Civil Service Comm'n*, Nos. 13430, 13484 (Haw. Dec. 19, 1989).

Moreover, the motion for recusal rests on the added premise that the Special Master is personally liable for the fee award. This premise is not correct. The appeal in

Partington v. Gedan, which sought prospective equitable relief, was against both the Special Master and Rule 13 Prosecutor in their official capacities. *See Papasan v. Allain*, 478 U.S. 265 (1986). Likewise, any award of attorneys fees against appellees in *Partington v. Gedan* would be against appellees in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159 (1973). The real party in interest upon that part of the judgment in *Partington v. Gedan* adverse to Appellees is the State of Hawaii. *See Missouri v. Jenkins*, 109 S. Ct. 2463 (1989); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Hutto v. Finney*, 437 U.S. 678, 693 (1978) (in official capacity action "it is obvious that the award will be paid with state funds").[1] For the reasons above, the motion for recusal is denied. As indicated by the Order to Show Cause, the Special Master will give the parties a full opportunity to present their claims.

Under the circumstances, to place the parties on notice of the course of proceedings, and absent a contrary order by the Supreme Court of Hawaii, it is hereby ordered that the hearing in the above-titled matter shall be held at 9:00 a.m. on the first business day thirty (30) days following the actual entry of mandate in the United States Court of Appeals for the Ninth Circuit in *Partington v. Gedan*, appeal No. 87-2375. The parties are well advised to monitor the progress of the Office of the Clerk of the United States Court of Appeals in issuing the mandate,

---

[1] There is also a substantial claim that, given the structure of the Court of Appeals' ruling in *Partington v. Gedan*, the propriety of a facial recusal motion such as that brought here is procedurally precluded by the res judicata and collateral estoppel effects of the Court of Appeals' decision.

which has not yet issued. The parties will be notified, by an appropriate order, of the courtroom or other place where the hearing in this proceeding will take place.

Fifteen days before the hearing date, but not later than March 10, 1990, the parties shall submit the following papers to facilitate the Special Master's adjudication herein:

(1) Briefs addressing the first, third, fourth, fifth, and sixth questions in Mr. Brown's March 19, 1987, letter, stating definitively the party's position thereon;

(2) Proposed findings and conclusions of law, and a hearing memorandum containing a statement of the case, issues presented, standards of review, and legal arguments, together with legal citations and citations to proposed documentary or testimentary evidence proposed, as to all matters raised by the parties hereto, including claims and defenses under the Constitutions of the United States and the State of Hawaii, and all grounds why the Rule 13 proceeding should be dismissed, or why other action allowed by Rule should or should not be undertaken;

(3) Memoranda addressing any other matters the parties deem necessary for ruling, including, but not limited to, the desire, or right, of the parties for an earlier or later hearing, or postponement for purposes of discovery;

(4) A list of all witnesses expected to be called, documentary or other evidence to be proffered, and a brief summary of the substance of the evidence proposed;

(5) Any other documents, exhibits memoranda, motions, or papers the parties believe appropriate or necessary.

A prehearing conference will be held five days prior to the date of hearing, at 9:00 a.m. at a courtroom or other place to be announced. All parties shall file an original and five copies of papers required or allowed by this Order in the Supreme Court of Hawaii in appeal No. 10041, and under the caption as designated in the January 11, 1990, Order to Show Cause, and in this Order. Failure to file papers in accordance with the time limits of this Order will constitute a waiver of objection as to the matters not presented. Formal motions in advance of hearing will be entertained if filed up to and including the due date stated above for other filings. Any motion shall state with particularity the grounds upon which it is based, and the order or relief sought, and shall be accompanied by briefs, affidavits, or other papers as appropriate. Motions shall be served on the opposing party by hand delivery to the opposing party's place of business, and a response shall be filed within five days after service. All papers on motions shall be filed in the Hawaii Supreme Court in appeal No. 10041, and under the caption as designated in the January 11, 1990, Order to Show Cause, and in this Order. The Special Master, in light of the statements in Respondent's letter of January 16, 1990, considers Respondent to be now proceeding *pro se*. If any other persons are to appear for Respondent, a notice of appearance shall be filed in the Supreme Court of Hawaii in advance the appearance.

This order, or any part thereof, is subject to reconsideration if objection is filed within ten (10) days of its entry.

The Office of the Clerk of the Supreme Court of Hawaii is directed to serve this Order forthwith upon the

parties at their present addresses, as furnished to the Office of Disciplinary Counsel, State of Hawaii, by first class United States Mails.

Dated: Honolulu, Hawaii, February 1, 1990.

/s/ Joseph M. Gedan
JOSEPH M. GEDAN
Rule 13 Special Master

[Exhibits Deleted]

APPENDIX "G"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)))))))	CR. NO. 59285

FILED*
1990 FEB 5 PM 3:05
Sandra H. Yasui
CLERK SUPREME COURT

MOTION FOR RECUSAL OF THE PRESENT JUSTICES AND RETIRED JUSTICE NAKAMURA, TO DISQUALIFY SPECIAL MASTER AND SPECIAL PROSECUTOR, FOR DECLARATION AS TO THE NATURE OF THE RULE 13 PROCEEDING HEREIN, FOR AN ORDER REQUIRING THE ISSUANCE OF AN ALLEGATION AND FOR DECLARATION AS TO THE PROCEDURE BY WHICH THE PROCEEDING IS TO BE CONDUCTED

Comes now Attorney Earle A. Partington *pro se* and respectfully requests this court for relief as follows:

1) For recusal of the present justices of the Supreme Court and Retired Justice Nakamura for the purpose of ruling on (a) the relief sought herein, and (b) any other matter before the court in this case, all based on the Certificate of Disqualification filed herein on January 19,

---

*Certificate, Memorandum, and other material deleted in printing.

1990, and for the reasons set forth in the Motion filed herein on January 19, 1990;

2) For an order disqualifying the Special Master and Special Prosecutor in No. 10041 for bias as set forth in the Affidavit of Disqualification filed January 19, 1990, in light of the Order filed by the Special Master on February 1, 1990, and the opinion in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), that Partington has a Federal constitutional right not to be subjected to a hearing before a biased tribunal, 880 F.2d at 124;

3) For a declaration as to the nature of the Rule 13 proceeding herein in view of the confusion created as to whether that proceeding is *de novo* (as argued by the Special Master and Special Prosecutor in *Partington v. Gedan, supra*), or is a dispositional proceeding only as held by clear implication in *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989);

4) In the event that the court declares in response to Partington's request in item (3) above that the Rule 13 proceeding against him is a *de novo* proceeding, it is requested that an allegation or complaint in the matter be served on Partington as required by Federal and state due process of law;

5) For a declaration of the procedure under which the hearing herein is to be conducted in view of the Special Master's refusal to provide Partington with notice of same, as set forth in the Order of February 1, 1990.

This motion is made pursuant to Rule 27 of the Hawaii Rules of Appellate Procedure, H.R.S. §601-7, and Article I, §5, of the Constitution of the State of Hawaii

and the Fourteenth Amendment to the Constitution of the United States; and is based on the attached Memorandum of Points and Authorities, and the records and files herein.

DATED: Honolulu, Hawaii, January 5, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

APPENDIX "H"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	
	)	

FILED
1990 FEB 12
Eugene L. Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the "Motion for Recusal of the Present Justices and Retired Justice Nakamura, to Disqualify Special Master and Special Prosecutor, for Declaration as to the Nature of the Rule 13 Proceedings Herein, for an Order Requiring the Issuance of an Allegation and for Declaration as to the Procedure by Which the Proceeding is to be Conducted" filed by Earle A. Partington, it appearing inappropriate for this court to issue rulings or declarations at this stage of the proceedings,

IT IS HEREBY ORDERED that the motion is denied, without prejudice to any exceptions or other timely relief that may be sought after the submission of the master's decision and proposed order to this court.

DATED: Honolulu, Hawaii, February 12, 1990.

FOR THE COURT:

/s/ Frank Padgett
Acting Chief Justice

APPENDIX "I"

PROCEEDINGS BEFORE THE SPECIAL MASTER

STATE OF HAWAII

IN RE: EARL A. PARTINGTON	) No. 10041
	) Supreme Court
	) Cr. No. 59285
	) First Circuit
	) Court
	) State of
	) Hawaii
_____	)

FILED
1990 FEB 27 PM 2:58
Sandra H. Yasui
CLERK SUPREME COURT

AMENDMENT TO ORDER OF FEBRUARY 1, 1990

Based upon respondent's application, the applicable Rules and law and the record to date the Special Master makes the following determinations:

1. The findings in the Memorandum Opinion of the Supreme Court dated December 27, 1985 reversing and remanding the underlying case were necessary to adjudicate the rights of the Appellant Clifford M. Clarke and with respect to the conduct of the counsel were an expression as to the state of the record for the purpose of that adjudication only. Rule 13 was initiated for the purpose of having a special master make an independent judgement on that same record with an opportunity for the respondent to offer evidence and argue in his defence. The Special Master therefore orders that these proceeding are to be *de novo* without regard to any stated or implied judgement by the Court on the conduct of counsel.

2. The five items enumerated in the Court's Memorandum Decision is the conduct which is at issue. The respondent has taken the position (1) that his conduct was not occasioned by neglect and (2) has not taken issue with the Court's finding that, absent justification as trial tactics, conduct of counsel would not be within the range of competency demanded of attorneys in criminal cases. The respondent's Answer filed March 25, 1986 takes the position that respondent's actions were justifiable and appropriate as trial tactics. Unless the respondent amends his answer the Special Master shall consider items (1) and (2) of this paragraph as admitted and that justification as trial tactics as the initial determination to be made.

The prosecutor shall have the burden of proving by a preponderance of evidence that from the record there appears no justifiable trial tactic which would warrant the conduct of counsel. That record does not contain any explanation by respondent of the tactical considerations. The respondent shall have the burden of going forward with the evidence demonstrating the tactical considerations underlying his conduct.

The respondent in his answer claims that because of the attorney-client privilege he is precluded from discussing the reasons or the circumstances for his tactical decision. Upon application by respondent the Special Master will continue the these proceedings to allow respondent to ask for an opinion from the Disciplinary Counsel on that matter. Respondent shall by March 9, 1990 advise the Special Master (1) whether he has or will ask the Disciplinary Counsel for an opinion, (2) if a continuance is requested for that purpose, (3) of the extent to which he will go forward with the evidence, and (4) of any other relief sought.

3. The prosecutor shall respond by March 16, 1990 and a pretrial hearing will be held on March 19, 1990 at 9:00 at a site to be designated at which time the Special Master will hear argument on any motions and set a discovery and hearing schedule.

4. The respondent and the prosecutor, subject to the approval of the Special Master may agree to modify the terms of this order.

5. To the extent it is inconsistent with this Order, the Order of February 1, 1990 is amended and the provisions of the full paragraph on page 6 of that order is withdraw.

DATED: Honolulu, Hawaii, February 27, 1990.

/s/ Joseph M. Gedan
Joseph M. Gedan
Rule 13 Special Master

Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI; EXHIBITS A AND B

PARTINGTON AND FOLEY
EARLE A. PARTINGTON
2450 PACIFIC TOWER
1001 BISHOP STREET
HONOLULU, HAWAII 96813
(808) 526-9500
PETITIONER PRO SE

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE
IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner Earle A. Partington, pro se, moves this Honorable Court pursuant to Rules 21 and 24.6 of the Rules of the Supreme Court of the United States to strike (1) the suggestion of mootness presented at pages ii, 17, 18 and 24-25 of Respondents' Brief in Opposition to the Petition for Writ of Certiorari filed April 26, 1990, and (2) Appendix J to the brief (pp. 55a-59a), because the case is not in fact moot.

Respondents' suggestion of mootness is based on Appendix J, which purports to be a waiver of the attorney-client privilege executed on April 20, 1990, by Petitioner's former client Clarke. Respondents argue that this purported waiver renders moot some if not all of the constitutional issues raised by Petitioner in his

Application for Writ of Certiorari. However, the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts. Respondents have not carried their heavy burden of proving waiver (Michigan v. Jackson, 475 U.S. 625, 633 (1986)) and their argument that the purported waiver renders this case moot is at best premature.

Serious ethical questions have been raised regarding the circumstances under which the purported waiver was obtained by Mark J. Bennett (successor to Howard T. Chang whom Respondents have argued "ought to be substituted as a party under this Court's Rule 35.3", brief at iii). These questions and challenges to the purported waiver had been raised and were known to Respondents by April 25, 1990, prior to the filing (but after the printing) of Respondents' Brief in Opposition.

The attached Exhibit A is a true and correct copy of an affidavit of Christopher Evans, Esq., executed on March 10, 1987. The attached Exhibit B is a true and correct copy of a motion filed by Samuel P. King, Jr., Esq., in the Hawaii Supreme Court on May 9, 1990, which sets forth most of the relevant events in this matter subsequent to April 20, 1990. On May 11, 1990, Mr. King's Motion for Appointment of New Counsel (attached to Exhibit B) was granted and additional counsel was appointed to advise Clarke regarding waiver of the attorney-client privilege.

Clarke has stated, by letter dated May 4, 1990 (attached to Exhibit B), that he does not want any further disclosures of privileged information until he can obtain a second opinion

regarding waiver of the privilege. Petitioner intends to rely upon Clarke's original invocation of the privilege (Exhibit A hereto) and the May 4, 1990, letter, the effect of which will foreclose Petitioner from discussing his trial tactics in the Clarke case. Based on the facts of this case as known to Petitioner, he expects that Clarke will continue to invoke the attorney-client privilege in the future. Therefore, this case is not moot, and Respondent's suggestion of mootness should be stricken from the Brief in Opposition and entirely disregarded by this Court in its consideration of whether to grant Petitioner's Petition for Writ of Certiorari.[1]

DATED: Honolulu, Hawaii, May 14, 1990.

EARLE A. PARTINGTON

EARLE A. PARTINGTON,
Petitioner

---

[1]Errata to the petition dated March 22, 1990:

At page 7 at note 6, the last sentence "See note 18." should read "See note 20."

At page 8, the reference to "Supreme Court Rule 17.1(c)" should read "Supreme Court Rule 10.1(c)."

At page 9, the reference to "Rule 17.1(a)" should read "Rule 10.1(a)."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARLE A. PARTINGTON, Plaintiff, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, Defendants.	CIVIL NO. 87-0172 AFFIDAVIT OF CHRISTOPHER R. EVANS

AFFIDAVIT OF CHRISTOPHER R. EVANS

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

CHRISTOPHER R. EVANS, being first duly sworn on oath, deposes and says:

1. I am the court-appointed attorney for Clifford M.M. Clarke, Sr., in Cr. No. 59285, in the Circuit Court of the First Circuit, State of Hawaii, now on a second appeal to the Supreme Court of Hawaii following Clarke's second conviction for murder in a retrial resulting from the reversal of his first conviction by the Supreme Court of Hawaii pursuant to a Memorandum Opinion dated December 27, 1985.

2. I replaced Earle A. Partington as Clarke's court-appointed attorney as a result of Mr. Partington's motion to withdraw as counsel because he was then no longer living in Hawaii.

3. I am aware that there is currently pending against Mr. Partington a proceeding brought by the Supreme Court of Hawaii pursuant to Rule 13 of the Hawaii Supreme Court Rules.

EXHIBIT A

4. Clifford M.M. Clarke, Sr., no longer requests a hearing on Circuit Judge Leland Spencer's complaint against Plaintiff as the reversal of his first conviction rendered his request moot.

5. Clifford M.M. Clarke, Sr., has no complaint against Plaintiff for his handling of Clarke's first trial and to the extent his letter requesting a hearing can be construed as a complaint, he withdraws any such complaint. Mr. Clarke is quite satisfied with the representation he received from Plaintiff.

6. On behalf of Clifford M.M. Clarke, Sr., I have instructed Mr. Partington to invoke the attorney/client privilege in this Rule 13 proceeding and any other proceeding because under no circumstances is Clifford M.M. Clarke, prepared to waive the privilege now or in the foreseeable future.

FURTHER AFFIANT SAYETH NAUGHT.

Christopher R. Evans
CHRISTOPHER R. EVANS

Subscribed and sworn to before me
this 11th day of March,
1987.

Donald L. Clarke
Notary Public, State of Hawaii

My commission expires: 5/1/88

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO STAY RULE 13 PROCEEDING

AFFIDAVIT OF SAMUEL P. KING, JR.

EXHIBIT 1

SAMUEL P. KING, JR. 1396

KING & KING, Attorneys-At-Law
Dillingham Transportation Bldg.
Suite 308, 735 Bishop Street
Honolulu, Hawaii 96813
Tel. No. 521-6937

Attorney for Defendant-Appellant

EXHIBIT B

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO STAY RULE 13 PROCEEDING

Defendant-Appellant hereby moves, through his attorney SAMUEL P. KING, JR., that this Court stay the Rule 13 proceeding presently being prosecuted against Earle Partington by this Court, until such time as Defendant-Appellant's motion of appointment of new counsel is resolved by Judge Huddy in Circuit Court and Defendant-Appellant has a chance to reconsider the advisability of waiving his attorney-client privilege in the Rule 13 proceeding. This motion is based on the file in this case and the attached affidavit of counsel.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	Cr. No. 59285
In re EARLE A. PARTINGTON	

AFFIDAVIT OF SAMUEL P. KING, JR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

SAMUEL P. KING, JR., being first duly sworn upon oath, deposes and says:

1. He is personally familiar with the facts stated herein.

2. He is the court-appointed attorney for Defendant-Appellant in Family Court proceedings.

3. Although the Family Court proceeding that Affiant was appointed to represent Defendant-Appellant in was terminated by a court order of the Family Court, the order provides for reopening of the proceeding upon motion of DSSH if and when Defendant is released by the Department of Corrections. As Affiant's affidavit in

Exhibit 1 attached hereto explains, Affiant has made the determination that he has a present and on-going duty to protect Defendant's interests in Family Court, and Affiant is bringing this motion based on his duty to protect Defendant's interests.

4. Affiant has submitted a motion on behalf of Defendant to be heard by Judge Huddy to make a determination as to whether Judge Huddy should appoint new counsel to represent Defendant so that Defendant can obtain a second opinion as to whether he should waive his attorney-client privilege in the Rule 13 proceeding in this case. A copy of the motion submitted to Judge Huddy is attached hereto as Exhibit 1. The motion is presently submitted to Judge Huddy to obtain a hearing date.

5. Affiant believes, as explained fully in his affidavit attached to Exhibit 1, that it is not in Defendant's best interests to waive his attorney-client privilege in this Rule 13 proceeding. Defendant has requested that new counsel be appointed to represent him in his criminal case so that he can obtain a second opinion on the issue of waiver. Defendant is presently uncertain as to whether he should waive his privilege and does not want any further waiver of the privilege

until he obtains his second opinion.

6. Based on the pending motion before Judge Huddy and Defendant's desire not to have any further waiver of his privilege, this Rule 13 proceeding should be stayed until Defendant has had a chance to have full and proper consultation about whether or not he should waive his attorney-client privilege.

7. Based on the facts that Affiant has learned to date, Defendant's April 20, 1990, waiver of the attorney-client privilege was and is completely invalid because Defendant was not fully advised on the effect of the waiver as required by DR 4-101(C)(1). Failure to stay these proceedings until Defendant can be fully advised would be a violation of Defendant's right to counsel and a breach of his right to assert his attorney-client privilege and would very probably hurt him in his future dealings with Family Court and the Parole Board.

Further Affiant sayeth naught.

Samuel P. King

SAMUEL P. KING, JR.

Subscribed and sworn before me on this
8th day of May, 1990.

Victoria A. Chock

Notary Public, State of Hawaii
My commission expires: 10-30-92

SAMUEL P. KING, JR. 1396

KING & KING, Attorneys-At-Law
Dillingham Transportation Bldg.
Suite 308, 735 Bishop Street
Honolulu, Hawaii 96813
Tel. No. 521-6937

Attorney for CLIFFORD CLARKE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	) Civ. No. 59285
vs.	) MURDER
CLIFFORD CLARKE,	) MOTION FOR APPOINTMENT OF NEW COUNSEL; AFFIDAVIT OF SAMUEL P. KING, JR.; EXHIBIT A; NOTICE OF MOTION
Defendant.	)

MOTION FOR APPOINTMENT OF NEW COUNSEL

Defendant hereby moves, through his Family Court attorney SAMUEL P. KING, JR., for the release of CHRISTOPHER EVANS as his court-appointed counsel, and the appointment of new counsel to represent him in the above-captioned criminal matter. This motion is based on the attached affidavit of counsel, the file in this case and will be further based on the evidence adduced at the hearing on this motion.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE ATTACHED

EXHIBIT 1

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	Civ. No. 59285
vs.	MURDER
CLIFFORD CLARKE,	AFFIDAVIT OF SAMUEL P. KING, JR.
Defendant.	

AFFIDAVIT OF SAMUEL P. KING, JR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

SAMUEL P. KING, JR., being first duly sworn upon oath, deposes and says:

1. He is personally familiar with the facts stated herein.

2. He is the court-appointed attorney for Defendant in Family Court and represented Defendant regarding Family Court proceedings to which Defendant was a party regarding Ronica Ann Arcala, the victim of the Murder charge in this case, and four of Defendant's own children (the "Clarke minors").

3. More specifically, Defendant was named as a party to the Family Court proceeding which was instituted for the protection of Ronica Ann Arcala in 1982. In 1982, the Family Court was concerned that Ronica's mo-

ther, Debra Arcala, was not taking adequate care of Ronica and may have been abusing her. When the Family Court first instituted its proceeding on behalf of Ronica, Defendant was Debra Arcala's live-in boyfriend and was not a party to the proceeding since Ronica was not Defendant's natural or adopted child. Later in the proceeding, because Defendant was in the Arcala household, Defendant was added as a party to the Family Court proceeding, but he was not suspected of abusing Ronica. When Defendant was joined as a party in the Family Court proceeding, Affiant was appointed to represent him.

4. When Ronica suddenly died, Defendant became a suspect in her death, and the Family Court took jurisdiction over the Clarke minors who were living with Defendant's wife, Sandy. Affiant then represented Defendant as to the Ronica Ann Arcala proceeding and the Clarke minors proceeding.

5. Earle Partington was appointed to represent Defendant at his first criminal trial at which Defendant was convicted. Mr. Partington handled the appeal of that conviction. The Supreme Court of Hawaii reversed the conviction on the basis that Mr. Partington had been intentionally ineffective even though that was not an issue on appeal. Because of that finding by the Supreme

Court, a Rule 13 proceeding was instituted against Mr. Partington.

6. Christopher Evans was appointed to represent Defendant at his second criminal trial at which he was again convicted. Mr. Evans handled Defendant's appeal from the second conviction which was affirmed by the Hawaii Supreme Court.

7. On April 20, 1990, Mr. Evans took a trip to visit Defendant at Kulani Honor Camp where Defendant is presently housed within the correctional system. Mr. Evans took Mark Bennett with him. Mr. Bennett is the person who was recently appointed to prosecuted the Rule 13 proceeding against Mr. Partington. Howard Chang had been prosecuting the Rule 13 proceeding prior to Mr. Bennett's appointment, but Mr. Chang resigned as the prosecutor.

8. In the presence of Mr. Bennett and without knowing what Mr. Partington would say if the attorney-client privilege were waived, Mr. Evans consulted with Defendant as to whether he should wavie his attorney-client privilege with respect to the Rule 13 proceeding against Mr. Partington. Defendant singed a document entitled "Limited Waiver of Lawyer - Client Privilege of Clifford M. M. Clarke, Sr." at that meeting with Mr.

Evans and Mr. Bennett on April 20, 1990. After signing the waiver, Defendant gave a taped statement in which he answered questions of Mr. Bennett about his attorney-client relationship with Mr. Partington.

9. When Affiant heard of Defendant's wavier and the manner in which it was obtained, Affiant became very concerned. First, Affiant did not believe that it was appropriate for Mr. Evans to have consulted about the waiver with Defendant in the presence of Mr. Bennett. Second, Affiant believed that Mr. Evans did not fully advise Defendant on the effect of the waiver because Mr. Evans never found out what Mr. Partington might say about Defendant if the attorney-client privilege were waived. Third, Affiant became most concerned about his own duty toward Defendant with respect to any pending or future Family Court proceedings.

10. Affiant consulted with Disciplinary Counsel on any duty he might have toward Defendant and with Judge Heely, Chief Judge of the Family Court, to check on the status of the previous Family Court proceeding. After these consultations, Affiant determined that he did have a duty at least to advise Defendant of his concerns. Affiant did this by calling Defendant at Kulani last week. Affiant obtained Defendant's permission to talk

to Mr. Partington about what Mr. Partington might say if he were required to discuss his attorney-client communications with Defendant in the Rule 13 proceeding. Affiant then called Mr. Partington and was briefed by Mr. Partington on what he would say. Affiant then called Defendant back and discussed with Defendant the advisability of waiving the attorney-client privilege. Defendant finally asked Affiant to assist him in obtaining a new criminal court-appointed attorney for him so that he could get a second opinion on whehter or not he should waive his attorney-client privilege. A copy of the letter signed by Defendant regarding his request for a new attorney is attached hereto as Exhibit A.

11. Upon advising this Court about Defendant's request today, Affiant was advised that a motion had to be filed to make a determination regarding the advisability of appointing new counsel for Defendant. This motion has been filed so that such a determination can be made.

12. Affiant is making this motion based on his duty to protect, as much as he can, Defendant's interests in pending and potential future Family Court proceedings and because Affiant believes that if Defendant waives his privilege, he can only be harmed by such waiver in Family Court proceedings. Such waiver cannot

help him at all. Also, the waiver may well be adverse to him in criminal proceedings related to this case - e.g. parole hearings, etc.

13. Affiant believes that a hearing on this motion should be set as soon as possible since Mr. Bennett is pressing to require Mr. Partington to give a deposition in the Rule 13 proceeding and now has a motion pending before the Surpeme Court to that effect.

14. The hearing on this motion should be closed to the public and held in camera since it involves matters relating to Defendant's attorney-client privilege, and the only persons who should be entitled to be present during the hearing on this motion, except for appropriate testifying witnesses, should be persons who have an attorney-client privilege with Defendant.

Further Affiant sayeth naught.

SAMUEL P. KING, JR.

Subscribed and sworn before me on this 8th day of May, 1990.

Notary Public, State of Hawaii

My commission expires: 10-30-93

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS

MEMORANDUM

To: Samuel P. King, Jr., Esq. Date: 05/09/90

From: Kulani Correctional Facility Time : 9:00 a.m.

Subject: Signature - Inmate Clifford Clark, Sr.

F A X TRANSMITTAL

Page Total, Including Transmittal Memorandum 2

Instructions/Comments:

Pls. send original for signature and transmittal.

DOC 1005 (3/88)

EXHIBIT A

Samuel P. King Jr. **King & King** Adrienne S. King
Attorneys at Law
Dillingham Transportation Bldg., Suite 309
735 Bishop Street
Honolulu, Hawaii 96813
(808) 521-6067

May 4, 1990

Clifford Clarke
c/o Kulani Correctional Facility
SR 01, Stainback Highway
Hilo, Hawaii 96720

Attn: Dan Unis
Program Section

Dear Clifford:

Pursuant to our phone conversation today in which you indicated you would like to have a new criminal defense attorney appointed to represent you and thereby get a second opinion as to whether you should waive your attorney-client privilege with respect to Earle Partington, I will make your desire known to Judge Huddy. Please sign this letter below and return it to me so that I can give Judge Huddy written confirmation of your desire. Meanwhile, I will advise Judge Huddy that at present you are now uncertain as to whether it is in your best interest to waive your attorney-client privilege and that you do not want any further disclosures of your communications with any attorney, including Earle Partington, until you get a second opinion as to whether you should waive your attorney-client privilege.

Very truly yours,

Samuel P. King, Jr.

APPROVED AS TO FORM AND CONTENTS:

CLIFFORD M. M. CLARKE, SR.
May 4, 1990

SPK:ac

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	) Civ. No. 59285
	)
vs.	) MURDER
	)
CLIFFORD CLARKE,	) NOTICE OF MOTION
	)
Defendant.	)
	)

NOTICE OF MOTION

TO: Christopher Evans
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813

PLEASE TAKE NOTICE that the attached Motion will be presented before the Honorable WENDELL K. HUDDY in his Chambers in Kaahunamu Hale, Honolulu, Hawaii, on _____, the _____ day of May, 1990, at _____ o'clock ___.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered to Christopher Evans, counsel for Defendant, on May ____, 1990.

DATED: Honolulu, Hawaii, May ____, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered or mailed to following persons as specified on May 9, 1990:

JOSPEH M. GEDAN
3703 Round Top Drive
Honolulu, Hawaii 96822

MARK BENNETT
McCorriston, Miho & Miller
500 Ala Moana, Suite 400
Honolulu, Hawaii 96813

EARLE A. PARTINGTON
Pacific Tower, Suite 2450
1001 Bishop Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, May 9, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following person(s) on May 14, 1990, to the address below by:

( ) HAND-DELIVER

(X) MAIL

TO: STEVEN S. MICHAELS
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Attorney for Defendants

JOHN ASHFORD THOMPSON
Suite 600
810 Richards Street
Honolulu, Hawaii 96813

Attorney for Amicus Curiae Hawaii
Association of Criminal Defense Lawyers

EARLE A. PARTINGTON

No. 89-1531

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AND MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE SUGGESTION OF MOOTNESS

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

CORINNE K.A. WATANABE
First Deputy Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Respondents
(Petitioners in No. 89-1506)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 89-1531

In The

Supreme Court of the United States

October Term 1989

EARLE A PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AND MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE SUGGESTION OF MOOTNESS

Respondents Joseph M. Gedan, Special Master appointed by the Supreme Court of Hawaii, et al., respectfully submit this memorandum in opposition to the Motion to Strike Suggestion of Mootness dated May 14, 1990, filed by Petitioner Earle A. Partington in No. 89-1531, and to bring to the Court's attention pursuant to Rule 15.7 potentially relevant events in the Hawaii courts and courts below since filing of Respondents' Opposition.

I. STATEMENT

Following *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Brief in Opposition focuses on "the situation that existed on the morning of [March 9, 1987,] when this case was filed in the United States District Court." *Id.* at 17 (*see* Resp. Br. at 2 n.1, 28 n.5). Nonetheless, because of the importance of informing this Court of any matters that might bear on "what issues would properly be before the Court if certiorari were granted," Respondents have briefed the Court on developments in the state courts following the denial of rehearing by the Ninth Circuit. *See* Rule 15.1 and Resp. Br. at 2 n.1, 16-17. Petitioner's motion to strike the suggestion of mootness made in the Brief in Opposition in light of the waiver of the attorney/client privilege effected by Petitioner's former client (Resp. App. "J" (No. 89-1531)), seeks to raise in this Court added developments in the state courts. To see why these developments not only merit denial of the motion to strike, but fortify the reasons why the Petition itself in No. 89-1531 should be denied, it is important to review what has, and has not yet, occurred in the state courts, and the courts below, since April 26, 1990.

1. Following the filing of Respondents' Brief in No. 89-1531, Petitioner, at his deposition on May 1, 1990, in the Rule 13 proceedings, took the official position that, despite Clarke's waiver of the attorney/client privilege, the privilege still applied. The Special Master overruled the objection, and Partington still refused to testify. On May 2, 1990, the Rule 13 Prosecutor moved in the Supreme Court of Hawaii for an order that would compel Partington to testify. On May 15, 1990, the Hawaii Supreme Court denied the motion to compel, apparently

believing that Partington had invoked his Fifth Amendment rights against self-incrimination. The Court emphasized, however, that "attorney Partington shall be afforded full opportunity to appear [at the Rule 13 proceeding] and present evidence and arguments on his behalf." On May 16, 1990, the Rule 13 Prosecutor moved to have that ruling reconsidered, as Partington had made clear that he has not relied on his privilege against self-incrimination. On May 23, 1990, the Supreme Court of Hawaii denied the motion for reconsideration. It did not change its earlier ruling that "Partington shall be afforded full opportunity to appear and present evidence and arguments." *See* Resp. Supp. App. "K," "L," "M," and "N," *infra*.

2. Meanwhile, on April 28, 1990, Partington moved in the United States Court of Appeals for the Ninth Circuit, in the action below, for an order imposing sanctions upon the appellees in that case, Respondents here, for their response, sent to the court of appeals on April 26, 1990,[1] to a motion to recall the mandate and for other relief filed April 20, 1990. In that response, the State Officials suggested to the Ninth Circuit, as they did here, that Clarke's waiver of the attorney/client privilege had mooted many if not all of Partington's underlying claims, and, a fortiori, any basis for overcoming *Younger* abstention. On May 11, 1990, Partington's motions to recall the mandate and for Rule 11 sanctions were denied by the panel. Resp. Supp. App. "O" and "P," attached *infra*.[2]

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[1] Respondents' opposition to the petition in No. 89-1531 was also due in this Court on April 26, 1990. *See* Pet. Motion at 2.

[2] On May 9, 1990, the District Court, in the action below, entered an order denying Petitioner's motion for preliminary

(Continued on following page)

II. ARGUMENT

Partington's motion to strike the suggestion of mootness in No. 89-1531 is inappropriate and should be denied. Even if the Supreme Court of Hawaii's recent orders do not unambiguously moot the attorney/client privilege question that forms the basis of many if not all of Partington's underlying federal claims, the suggestion of mootness was made in good faith, and remains an important reason why review should be denied in No. 89-1531.

The panel below, in denying Partington's motion to recall the mandate and for appellate sanctions, rightly came to this conclusion, and so should this Court. Indeed, while invoking this Court's rule authorizing the striking of briefs that contain "burdensome, irrelevant, immaterial and scandalous matter," Petitioner's arguments demonstrate that abstention was always, and remains, appropriate, as "the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts." Motion to Strike at 2. Petitioner's motion, and the recent developments in the state courts, only confirm that abstention was, and remains, proper.

(Continued from previous page)

injunction in connection with his motion for Rule 60(b) relief, to which the motion to recall the mandate was related. That day, May 9, 1990, Partington filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking review of the District Court's denial, in a second federal action, *Lau v. Lum*, No. 89-0400 (D. Haw. amended Mar. 1, 1990), on May 3, 1990, of *ex parte* motions for temporary restraining orders or, in the alternative, expedited setting of a motion for preliminary injunction of the Rule 13 proceedings here. On May 25, 1990, the *Lau* appeal was dismissed and the emergency motion was denied.

A. A Suggestion of Mootness Was and Remains Appropriate.

As suggested in the Brief in Opposition, many if not all of Petitioner's arguments for overcoming *Younger* abstention turn on the asserted procedural inhospitality in the state courts that purports to arise from the attorney/client privilege. *See* Resp. Br. at 22-24, 28; *see also* Pet. at 12, 14-16, 20, n.1 & n.24.

Although, for the reasons raised in the Brief in Opposition, irrespective of Clarke's waiver of the privilege these arguments plainly do not generate any ground for overcoming abstention, or otherwise justifying review, it was fully appropriate for the Attorney General to suggest these privilege issues are moot:

> [C]ounsel . . . have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation. *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). When a development . . . could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay*. . . .

Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (emphasis on "without delay" in original); *see Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990); *see also* this Court's Rule 15.1. Here, a suggestion of mootness is especially apt as the suggestion "concerns the effect of the voluntary acts of a third-party nondefendant." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1982) (per curiam).

Petitioner's argument that the privilege issue is not moot rests on the claim that "[r]espondents have not carried their heavy burden of proving waiver" [Motion at

2]. Yet a close perusal of the written waiver signed by Clarke on April 20, 1990, shows it to be, on its face, full and complete. The waiver form acknowledges the existence of the privilege, and in the face of that knowledge, "expressly release[es] Earle Partington and any representative of Earle Partington from claiming the lawyer-client privilege with regard to" four of the five areas of Partington's conduct that provided the basis for the retrial in the *Clarke* case. Resp. App. 57-59 (No. 89-1531). The form states "this waiver may be held not to be a limited waiver, but rather a waiver as to all confidential communications" and states "that my current attorney, Christopher R. Evans, has fully explained to me all matters set forth in this waiver, and I make this waiver freely, voluntarily, and intelligently." Resp. App. 59 (No. 89-1531). Petitioner makes no claim that Clarke was mentally incompetent or otherwise legally incapacitated when he made this waiver. Under the Hawaii rules of evidence, the client is deemed to waive the privilege if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Haw. R. Evid. 511. This waiver authority is in addition to the "self-defense" exceptions codified both in Hawaii's disciplinary rules, 880 F.2d at 120-24, and in Haw. R. Evid. 503(d)(3). Not only did Clarke "consent to disclosure," in his discussions with the Rule 13 prosecutor Clarke discussed various of his conversations with Petitioner concerning the tactics at his murder trial. *See* Mem. at 3-4 and citations therein, No. 10041 (Haw. May 2, 1990) (Resp. Supp. App. 4-5); *see also* Resp. Supp. App. 22-24. Indeed, as noted in the Brief in Opposition, Clarke in fact waived the privilege as a matter of law as early as October 30, 1984, when he disclosed to the state Circuit Court the tactical basis for Petitioner's

refusal to make a closing argument ("a tactic to find pitty from the Jury"), and stated that "I made the wrong decision in agreeing with my lawyer" as "I did want a closing." *See* Resp. Br. at 12 (citing to Resp. App. 21 (No. 89-1531)).

Petitioner's motion to strike asserts that "[s]erious ethical questions have been raised regarding the circumstances under which the purported waiver was obtained," but does not provide any authority for suggesting that these "questions" render the waivers ineffective for present purposes. Petitioner cites no Hawaii case that allows the privilege, once waived, to be "reinvoked," and such "reinvocation" arguments are at best novel.

Petitioner's suggestion that the waiver is ineffective, which is nowhere supported clearly in the motion to strike, appears to rest on the premise that Mr. Evans, the counsel who advised Clarke on the waiver, did not know "what Mr. Partington would say if the attorney/client privilege were waived" (*see* Aff. of Samuel P. King, Jr., at ¶8 (Exh. 1 to Exh. "B" to Motion to Strike)). This argument is simply illogical. Whatever Clarke told Evans about what Partington knows, Clarke knows what he said to Partington. Indeed, even assuming that the standards of *Edwards v. Arizona*, 451 U.S. 477 (1981), are at all applicable in this context, there is simply no authority for the view that the type of disclosure Petitioner appears to believe necessary would be required. Indeed, this Court has never held *Edwards* to " 'require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' " *Colorado v. Spring*, 479 U.S. 564,

576-77 (1987); *see also Duckworth v. Eagan*, 109 S. Ct. 2875, 2879-80 (1989).

Of course, as stated in the Brief in Opposition, Petitioner's assertion of Clarke's Sixth Amendment interest in confidentiality is especially inapt insofar as Partington's and Clarke's interests in the privilege are directly opposing, and thus Partington's standing to raise Clarke's Sixth Amendment claims is dubious at the least. Moreover, Clarke himself has no Sixth Amendment interest in this context as he has been reconvicted, and does not stand "accused" of any new crimes to which the Sixth Amendment applies, let alone the subject of specific prosecution attempts to use any information against him. Resp. Br. at 23 (citing authorities); *see also United States v. Gouveia*, 467 U.S. 180, 188-92 (1984). Finally, Partington did not firmly press the "privilege" issue below as one implicating anyone's Sixth Amendment "privilege." Petitioner's effort to impart federal "overtones" to the privilege issue is "spurious." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985). Indeed, as the Hawaii Supreme Court ruled on May 15, 1990, and let stand by its order of May 23, 1990, "attorney Partington shall be afforded full opportunity to appear and present evidence and arguments on his behalf." As the record stands, there is no impediment to his voluntary testimony.[3]

Given this record, it is fully appropriate for the Attorney General to suggest that any issues arising out of the attorney/client privilege are moot. Partington's fears that he may be subject to discipline for improperly disclosing

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[3] This is confirmed by the May 15, 1990, denial of Clarke's motion to stay the Rule 13 case pending Clarke's "reconsideration" of whether he should stand by his privilege waiver.

client confidences (*see* Resp. Supp. App. 37) are "simply too remote from the present controversy to keep this [issue] alive." *Iron Arrow*, 464 U.S. at 71. Petitioner's bases for seeking review simply do not exist.

B. The Recent Developments Only Confirm that The Court Below Was Required to Abstain.

Petitioner's Motion to Strike also fundamentally ignores that one of the central bases of the judgment below, of which he seeks review, "is *Pennzoil's* requirement that the attorney-client privilege must be shown by 'unambiguous' authority to bar disclosure of the evidence Partington asserts he needs," Resp. Br. at 24. For in asserting that "the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts" (Motion to Strike at 2), Petitioner only confirms that abstention was, and remains, required under this Court's settled precedents. Thus, even if Petitioner takes the Supreme Court of Hawaii's express assurance that he may have "full opportunity to appear and present evidence and arguments" as not unambiguously *mooting* the attorney/client privilege issue, he has still not shown that state law unambiguously *bars* presentation of the information he claims he needs to defend himself. Insofar as Clarke's waivers now raise at the least another ground (in addition to the "self-defense" exceptions to the privilege) by which the "privilege stymie" issue may be eliminated in the state courts, abstention is even more forcefully compelled than when this case was decided below. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987); *Partington v. Gedan*, 880 F.2d 116, 123 (9th Cir. 1989) (citing *Pennzoil*).

The claim that matter bearing on Clarke's waiver of the attorney/client privilege is "burdensome, irrelevant,

immaterial [or] scandalous" (Rule 24.6) is untenable.[4] In fact, the matter confirms that the writ in No. 89-1531 ought be denied.

III. CONCLUSION

For the reasons above and in the Brief in Opposition, the Motion to Strike and the Writ in No. 89-1531 should be denied.

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

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Counsel for Respondents
(Petitioners in No. 89-1506)

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[4] A review of the past thirty years' of this Court's rulings suggests that this Court has not in its recent history granted a motion to strike like that here. *E.g., Matthews v. United States*, 429 U.S. 1121 (1977); *Love v. Dade County*, 423 U.S. 876 (1975); *Fiorini v. Wayne Circuit Judge*, 414 U.S. 982 (1973); *Haffke v. California*, 401 U.S. 1014 (1971); *Loptein v. City of Sycamore*, 393 U.S. 11 (1968); *Delaney v. United Services Life Insurance Co.*, 385 U.S. 846 (1966); *Neering v. Florida*, 377 U.S. 980 (1964); *Reichert v. Borough of Schuylkill Haven*, 369 U.S. 889 (1962); *Coduto v. United States*, 365 U.S. 881 (1961).

APPENDIX "K"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

FILED 1990 MAY 2 P 3:24
Eugene L. Sabado
CLERK SUPREME COURT

EMERGENCY APPLICATION AND MOTION TO THE* SUPREME COURT FOR AN ORDER PURSUANT TO RULE 37 OF THE HAWAII RULES OF CIVIL PROCEDURE

Mark J. Bennett, the Rule 13 Prosecutor, pursuant to Rule 37 of the Hawaii Rules of Civil Procedure, asks this Court for an order directed to Earle A. Partington, directing him to answer each and every question asked him by the Rule 13 prosecutor in his deposition of May 1, 1990, which he refused to answer. A copy of the transcript of the deposition, which has been adjourned pursuant to Rule 37(a)(2), is attached to the accompanying Affidavit

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* Cover, proposed order, certificate, and other matter deleted in printing

of Mark J. Bennett as Exhibit "A". This Emergency Application and Motion is based upon the attached Memorandum of Law, the attached Affidavit of Mark J. Bennett, the attached Affidavit of Christopher Evans, the attached Exhibits, and the files and records of this case.

Wherefore, the Rule 13 Prosecutor respectfully asks this Court for an Order pursuant to Rule 37 of the Hawaii Rules of Civil Procedure, as set forth above, and as set forth in the accompanying Memorandum of Law.

DATED: Honolulu, Hawaii, MAY 2 1990.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

MEMORANDUM OF LAW

The instant proceeding against Earle A. Partington is being conducted pursuant to Rule 13 of the Rules of the Hawaii Supreme Court. That Rule provides that there may be discovery conducted in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. The Master in this case, Joseph Gedan, has entered an Order allowing discovery, and set a discovery cutoff date of May 15, 1990.

The Rule 13 Prosecutor noticed the deposition of Earle A. Partington for May 1, 1990. A copy of the transcript of the deposition is attached as Exhibit A to the Affidavit of Mark J. Bennett. Pursuant to an order filed in this case, the Master agreed to preside over the deposition. As the transcript shows, Partington was asked a number of questions by Bennett, which he refused to answer. The Master ordered Partington to answer each and every one of the questions. Partington still refused. Some questions could arguably call for matters covered

by the lawyer-client privilege. However, in this case, the lawyer-client privilege, as to those questions has been waived. Many questions do not call for answers even arguably covered by the lawyer-client privilege.

Rule 503 of the Hawaii Rules of Evidence sets forth the lawyer-client privilege. As stated in Rule 503(b), the privilege belongs to the client, who may refuse to disclose such matters, and may prevent any other person from disclosing such matters. Rule 503(c) states that the lawyer shall claim the privilege unless expressly released by the client. Rule 503(d)(3) states that there is no privilege under this rule as "to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer. . . ." Rule 511 states: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is a privileged communication."

The Rule 13 Prosecutor has already filed in this Court a waiver signed by Clifford M. M. Clarke, Sr. A copy of that waiver is attached as Exhibit B to Mark J. Bennett's Affidavit. In the waiver, Clarke specifically states that pursuant to Rule 503(c) of the Federal Rules of Evidence, he releases Partington and any of Partington's representatives from claiming the lawyer-client privilege with regard to any confidential communications in three areas, dealing with opening statement, the testimony of Debralin Arcala, and closing argument. A transcript of an interview between Bennett, Clarke, and Clarke's attorney, Christopher Evans, was filed in the Supreme Court and

clearly demonstrates that Clarke discussed and disclosed all confidential communications he had with Partington in each of the three areas set out in his waiver.

In addition, attached to this Memorandum is the Affidavit of Christopher Evans. In this affidavit, Evans states that he has reviewed the transcript of the Partington deposition, and in particular, each of the questions which Partington refused to answer. He states that he does not believe that there is any lawyer-client privilege currently in existence, as to responses called for by any of these questions. He also makes clear that despite representations to him, by Partington, that Partington would hurt Clarke, if Clarke waived the privilege, Evans explained these matters to Clarke, and Clarke voluntarily waived the privilege.

Partington made other objections, all overruled by the Master. The Rule 13 prosecutor believes it is clear that these proceedings are legal and constitutional. Partington has claimed that *Matsuo v. State*, 70 Haw. ___, (No. 13488, Aug. 11, 1989) renders these proceedings unconstitutional. *Matsuo*, however, applies to post-conviction proceedings, and the Clarke's conviction was reversed on direct appeal; *Matsuo* is thus inapplicable. And, *Matsuo*, even were it relevant, has no bearing on the constitutionality of these proceedings.

Rule 37(a)(1) of the Hawaii Rules of Civil Procedure, which governs discovery orders, provides that when an application is for an order to a party, it may be made to the court in which the action is pending. This action is clearly pending before the Supreme Court. Rule 37(a)(2) provides that in the case of a deponent who refuses to

answer questions, the proponent of the unanswered questions may move for an order compelling answers. That Rule also provides that when an oral deposition is being taken, the proponent of the unanswered questions may adjourn the proceeding before he applies for an order to compel. In this case, the Rule 13 Prosecutor adjourned the deposition, pending a ruling on this Emergency Application.

Rule 26(b)(1), governing the scope of discovery, provides that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .It is not ground for objection that the information sought would be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." It is absolutely clear that the questions to Earle A. Partington are relevant to the subject matter of this Rule 13 proceeding.

The Rule 13 Prosecutor believes that most of the questions asked do not call for the disclosure of any privileged communications whatsoever. The Rule 13 Prosecutor believes that without even considering the question of privilege, this Court should order Partington to answer those questions.

There are questions which call for the disclosure of privileged communications. The Rule 13 Prosecutor believes, however, that as to these questions, the privilege was explicitly waived, by means of the form signed by Clarke, in the presence of his attorney. In addition, the privilege as to these matters was waived by Clarke's voluntary disclosure of the contents of the privileged

communications, or substantial parts of those communications, to the Rule 13 Prosecutor. In addition, the Court has the affidavit of Clarke's attorney, Christopher Evans, who himself has stated that he has reviewed the deposition transcript and believes that to the extent it requests privileged communications, the privilege has been waived. There is no legitimate basis for Partington refusing to answer the questions propounded to him.

While it is not entirely clear what the time limits for a response to this motion are, the Rule 13 Prosecutor will assume that pursuant to Rule 27(a) of the Hawaii Rules of Appellate Procedure, Partington has five days to respond. However, because the discovery cutoff in this case is May 15, 1990, the Rule 13 Prosecutor respectfully asks this Court to consider shortening the amount of time for respondent to this application as provided for in Rule 27(a) and Rule 26(d).

Wherefore, the Rule 13 Prosecutor respectfully asks this Court to grant this Emergency Application and Motion.

DATED: Honolulu, Hawaii, MAY 2 1990.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

AFFIDAVIT OF MARK J. BENNETT;
EXHIBITS A & B

STATE OF HAWAII	)	
	)	SS.
CITY AND COUNTY OF HONOLULU	)	

MARK J. BENNETT, being first duly sworn on oath, deposes and says on personal knowledge:

1. I am the prosecutor appointed in this matter pursuant to Rule 13 of the Rules of the Hawaii Supreme Court.

2. All of the facts set forth in the accompanying Memorandum of Law are true and correct to the best of my knowledge.

3. Attached as Exhibit A to my affidavit is a copy of the transcript of the May 1, 1990 deposition of Earle A. Partington. Attached as Exhibit B to this affidavit is a

copy of the Limited Waiver of the Lawyer-Client Privilege signed by Clifford M. M. Clarke, Sr.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

Subscribed and sworn to before me
this 2nd day of May, 1990

/s/ Charlene S. Shimabukuro
Notary Public, State of Hawaii

My commission expires: 10/25/93

EXHIBIT "A"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

(p.1) DEPOSITION OF EARLE ARTHUR PARTINGTON

Taken by the Rule 13 Prosecutor at the Law Offices of McCorriston Miho & Miller, Five Waterfront Plaza, Honolulu, Hawaii, commencing at 9:00 a.m., on Tuesday, May 1, 1990, pursuant to Notice. BEFORE: Colin J. Campbell, CSR No. 301

State of Hawaii

[material deleted in printing]

(p.3) DOREEN KAISER: If you want to raise your hand. Do you swear that you –

MR. PARTINGTON: I do. I'll tell the truth.

MR. BENNETT: Is that good enough?

MR. PARTINGTON: Yes.

DOREEN KAISER: You swear to tell the truth, the whole truth and nothing but the truth?

MR. PARTINGTON: I do. I do.

MASTER GEDAN: Off the record for a second.

(Discussion had off the record.)

EARLE ARTHUR PARTINGTON

called as a witness by the Rule 13 Prosecutor, being first duly sworn by Doreen Kaiser, Notary Public, State of Hawaii, was examined and testified as follows:

EXAMINATION

BY MARK J. BENNETT:

Q Mr. Partington, can you state your full name, please?

A. Earle Arthur Partington.

Q And your date of birth?

A February 14, 1942.

Q And where do you currently reside?

(p.4) A Mr. Bennett, I'd like to state for the record that this entire deposition is being conducted in violation of the Constitution of the United States and the State of Hawaii.

I would point out to you that on the 18th of April Mr. Gedan, the Special Master who is present here, ruled that there are no findings against me, there are no charges,

there are no allegations against me. Therefore, there is nothing for me to answer.

Further, this entire proceeding is an invasion of my First, Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution and the equivalent rights under the State Constitution.

I would point out that this is an entirely bad faith proceeding, brought solely for the purpose of harassing me, and other criminal defense attorneys in Hawaii to prevent us from zealously and ethically representing our clients.

You have no right to have me here. There is nothing for me to answer. I do not understand what the purpose of this hearing is.

I would point out to you that yesterday in the Ninth Circuit I filed another motion for (p.5) sanctions against Mr. Gedan, and apparently Mr. Michaels is treating you now as being fully substituted into Partington v Gedan, Ninth Circuit, and I ask for sanctions against you since Mr. Michaels has appeared in your behalf. I have noted there have been some very serious misrepresentations made by Mr. Michaels, and I would inform both of you that I believe you are in jeopardy of sanctions being imposed.

I can only state that this proceeding appears to be brought soley for the purpose of harassing me, and I see no purpose in continuing. I will not answer that question or any other question.

MASTER GEDAN: If that's an objection, I overrule the objection, Mr. Partington.

A I refuse to answer.

MASTER GEDAN: Wait, wait, let me finish my ruling. The matters you have discussed have been resolved by you action in the United States District Court, which has resulted in a dismissal. So the Ninth Circuit has ruled that this proceeding effectively can proceed. This deposition is nothing but an extension of that proceeding. So your objection is overruled.

(p.6) A I would point out to you that In Re: Ruffalo, the United States Supreme Court held that no attorney may be subjected to a disciplinary proceeding without notice of the charge or allegation. As I have no notice of any charge or allegation, and you yourself have stated there is none, this proceeding is unconstitutional.

Q (By Mr. Bennett) Mr. Partington, can you tell me your address?

All right. Mr. Gedan, I'm going to put on the record all of the questions which I wish to put to Mr. Partington –

MASTER GEDAN: Mr. Partington, you're not answering the question?

A I am not answering any further questions, and if Mr. Bennett intends to keep me here for some length of time I intend to use this as evidence that the Supreme Court of Hawaii and its agents are using this proceeding solely for the purpose of harassing me. I will not answer any further questions. Continuing this deposition is a waste of time. And if I'm kept here the two of you are on notice that I will use this as evidence of the bad faith by

the Supreme Court of Hawaii in attempting to harass me and other criminal defense (p. 7) attorneys in Hawaii to keep us from doing our constitutional duty to our clients.

MR. BENNETT: Mr. Gedan, what I'm going to, because I'm required to under Rule 37 of the Hawaii Rules of Civil Procedure, I'm going to put on the record the questions that I'd like to put to Mr. Partington, and I would ask, rather than we have to interrupt after every question, for a continuing order from you to Mr. Partington to answer those questions.

MASTER GEDAN: I don't know about a continuing order. I will direct Mr. Partington to answer that question.

A I will refuse to answer that question on the grounds of the Sixth amendment, in particular the right of independent counsel, the presumption of effective assistance of counsel, and the right of attorney-client privilege, as well as the First, Fifth and Fourteenth Amendments to the United States Constitution and the equivalent provisions of the State Constitution.

MASTER GEDAN: Objection overruled. Mr. Partington, if you decline to answer any questions, I will rule that those grounds may be, you need not state those grounds, but those grounds will be (p. 8) indeed the basis upon which, if you want, that any questions you refuse to answer are not answered, so that you don't have to repeat the authorities and the rationale that you have stated.

A I suggest to save time, Mr. Bennett just go through all his questions.

MASTER GEDAN: I want to make sure that there are not any questions which you are –

A I will not answer any further questions, period.

MASTER GEDAN: Let's go through the questions then.

Q (By Mr. Bennett) Mr. Partington, could you describe your legal education and your secondary education, describing which colleges you attended and/or graduated, which law school or law schools you attended and/or graduated?

My next question is, Mr. Partington, could you describe what courts before which you are admitted to practice law, the years which you were so admitted and those jurisdictions in which you currently actively practice law.

My next question is if you could describe where you currently maintain the practice of law.

My next question is could you describe (p. 9) any disciplinary action that has ever been taken against you by any court judge, bar association or bar commission?

MASTER GEDAN: Mr. Partington, you can state any additional grounds you did not state to some of these other questions. I might indeed find those questions are inappropriate.

A I do find it interesting that a lot of the questions seem to be taken right out of my complaints in federal court. It seems frivolous to ask me questions about my legal education when my complaint in Lau v Lung [sic] sets out all of these as well as my bar admissions.

MASTER GEDAN: Are you objecting to the questions based upon – are you willing to stipulate –

A I'm not willing to do anything.

MR. BENNETT: Could I just finish my questions?

MASTER GEDAN: All right. All right. All right.

Q (By Mr. Bennett) Mr. Partington, at what point in the proceedings of the trial against Clifford Clarke where he was charged with murder were you appointed to represent him?

(p. 10) My next question is do you recall your first meeting with Mr. Clarke and the circumstances under which it took place?

My next question is did you discuss with Mr. Clarke how you would be conducting the defense in his case?

My next question is with regard to the testimony of Debra Lynn Arcala, am I correct that the record reflects that you objected to her testimony that you objected to cross-examining her without access to certain family court records, and that you requested the judge to allow you to begin your cross-examination of her during the State's case after you received those records?

My next question is with regard to your decision to ask the judge to recall Debra Lynn Arcala for cross-examination during the State's case after you received the records, did you discuss those matters with Clifford Clarke?

My next question is, if you did discuss those matters with Clifford Clarke, that is attempting to cross-examine Debra Lynn Arcala after you received the records but during the State's case, can you describe to me what you said to Mr. Clarke and what Mr. Clarke said to you?

(p. 11) A I'd like to put something on the record here since Mr. Bennett is getting into privileged matters under the attorney-client privilege. I call Mr. Bennett's attention to DR 4-101-C-1 of the Hawaii Code of Professional Responsibility, a DR apparently that Mr. Bennett was unaware of when he went with Mr. Clarke's present attorney on April 20 to Kalani correctional facility to talk to Mr. Clarke. I am particularly concerned to have discovered –

Q What rule was that?

A DR 4-101-C-1. I am particularly concerned to have discovered that apparently during the entire time that Mr. Evans was advising Clifford Clarke at Kalani correctional facility on April 20th Mr. Bennett was present and heard every word. This would indicate quite clearly that Mr. Evans had abandoned his client, and that any purported waiver is not worth the paper it's printed on.

I do want to place on record that Mr. Bennett has informed my partner that he was indeed present throughout the entire conversation between Christopher R. Evans, the purported attorney for Clifford M.M. Clarke, Sr.

(p. 12) MASTER GEDAN: Wait, wait, wait. Just a minute. Mr. Partington, you have expressed some doubt as to the competency of Mr. Evans in representing Mr. Clarke in this matter.

A I filed a formal complaint with the Office of Disciplinary Counsel.

MASTER GEDAN: Let me ask you this, did you discuss with Mr. Evans prior to the deposition some of the issues and some of the problems that you thought Mr. Clifford would be facing should he waive his privilege?

A The day or two before the April 20th interview I went to Mr. Evans and warned him in his office that if Mr. Clarke waives the privilege it was my professional opinion that my testimony would be harmful to Mr. Clarke. I informed him that if he was going to discuss waiver with Mr. Clarke he should get permission of Mr. Clarke for me to reveal to Mr. Evans what those confidences were. And that if he advised Clifford Clarke to waive the privilege without finding out what I would say and informing Clifford Clarke of that he could be accused of mal-practice. Mr. Evans informed me that he was going to talk with the criminal administrative judge, Judge Huddy, and telephone me (p. 13) back. Mr. Evans did not telephone me back. Mr. Evans did not discuss the matter further. Mr. Evans made no effort to find out what I would say if the privilege were waived. Mr. Evans' action can only be described as incompetent beyond description.

MASTER GEDAN: But you have fully explained to Mr. Evans what you thought the risks were if Mr. Clarke should waive his deposition?

A I could not explain the risks fully without disclosing the privileged communications, and as Mr. Clarke had not authorized me to do so, all I could do was warn Mr. Evans that in my opinion they were harmful and suggest that he get permission of Mr. Clarke for me to reveal to Mr. Evans what they were.

MASTER GEDAN: And – now do you have any knowledge that Mr. Evans did not discuss the subject matter of your conversation with Mr. Clarke?

A Yes. Mr. Evans has no idea what I would say. He's never asked me and I've never told him.

MASTER GEDAN: That is not my question. Have you been informed that Mr. Evans did not discuss the subject matter of your conversation (p. 14) with Mr. Evans with Mr. Clarke?

A Since Mr. Evans did not know what I'd say, he would be incapable of discussing it.

MASTER GEDAN: Well, you made –

A And I've never told Mr. Clarke what I would say, so Mr. Clarke does not know either.

MASTER GEDAN: I understand that. You have expressed some doubts to Mr. Evans about what you might say and how that might affect Mr. Clarke. Whatever you said to Mr. Evans, you have no knowledge that Mr. Evans did not discuss what you said to him as limited as it was with Mr. Clarke?

A I was not present. I do not know what was discussed. But Mr. Bennett has informed my partner that he was there throughout and heard the entire conversation

and can state what Mr. Evans informed Mr. Clarke. I find it appalling that an attorney would consult with a client with someone who has an adverse or at least a different interest. That in itself would amount to a waiver of the privilege and is another act of incompetence by Mr. Evans.

MASTER GEDAN: If you are now expressing objection because of attorney-client privilege, I rule that if such a privilege does exist in this (p. 15) case, which is questionable under the circumstances of this proceedings, that the waiver filed in this case specifically waives that, and that objection, any objection on that grounds is overruled.

MR. BENNETT: I will also put on the record with regard to what Mr. Partington said that when I met with Mr. Clarke and Mr. Evans with regard to Mr. Evans' preliminary discussion with Mr. Clarke before I began recording my interview with him, Mr. Evans asked Mr. Clarke whether he wanted to consult with him without me there. I indicated that I would be happy to leave if that's what he wanted to do. And Mr. Clarke's response was positively and absolutely he did not and that he wanted to have the conversation with Mr. Evans with me present. I will now move on.

[material deleted in printing]

CERTIFICATE

STATE OF HAWAII)
) ss.
COUNTY OF HONOLULU)

I, COLIN J. CAMPBELL, Certified Shorthand Reporter, State of Hawaii, do hereby certify:

That on Tuesday, May 1, 1990 at 9:00 a.m., there appeared before me Earle Arthur Partington, the witness whose deposition is contained herein; and that prior to being examined, he was sworn by Doreen Kaiser, a Notary Public, State of Hawaii;

That the deposition contained herein was by me taken in stenotype and thereafter reduced to typewriting; that the foregoing is a true and complete transcript of the testimony of said witness.

I further certify that I am not of counsel for any of the parties hereto, and that I am not in any way interested in the outcome of the cause named herein.

DATED this 1st day of May, 1989, at Honolulu, Hawaii.

/s/ Colin J. Campbell
COLIN J. CAMPBELL, CSR
No. 301
Court Reporter, State of
Hawaii

[further material deleted in printing]

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

AFFIDAVIT OF CHRISTOPHER EVANS

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	)	SS.

CHRISTOPHER EVANS, being first duly sworn on oath, deposes and says on personal knowledge:

1. I am the attorney for Clifford M. M. Clarke, Sr.

2. Rule 13 Prosecutor Mark J. Bennett approached me, and asked whether my client, Clifford Clarke, would be willing to talk to him regarding conversations that Mr. Clarke had had with his previous attorney, Earle A. Partington. Mr. Bennett informed me that if Clarke talked to him, it could be considered a waiver of the lawyer-client privilege as to all confidential communications between Clarke, Partington, and any representative of Partington's. I spoke to my client, Clifford Clarke, and he

informed me that he was willing to talk to Mr. Bennett, and was willing to waive the lawyer-client privilege.

3. Prior to my meeting with my client, I was visited by Earle Partington. Among other things, Partington told me that if Mr. Clarke waived the privilege, that he, Partington, would "hurt Clarke" by divulging confidential information that would be harmful to Clarke in his present situation, and in various other ways. Partington also informed me that if Clarke waived the privilege, he would make certain that the media was informed of everything that he would have to say, and this would hurt Clarke's parole chances, and would damage Clarke in various other ways.

4. On the telephone, I explained all these facts to Clarke. Clarke indicated to me that he still wished to waive the lawyer-client privilege.

5. On April 20, 1990, I met with Clifford Clarke, along with Mark Bennett. I told Clarke that Mr. Bennett wanted to tape record an interview with him. Before the tape recorded interview began, I explained to Clarke again, each and every thing that Mr. Partington had told me, including the fact that if Clarke waived the lawyer-client privilege, Partington claimed he would say things that would damage Clarke. I also explained the waiver document to Clarke, telling him specifically that while it was styled a limited waiver, a court could well construe it to be a total waiver of all privileged communications between Clarke, Partington, and any representative of Partington's. I specifically told Clarke that if he signed the waiver, and spoke to Mr. Bennett, he could be compelled to divulge all such privileged communications,

and Partington could similarly be compelled to divulge all such privileged communications. Clarke again informed me that he understood all of this, that he understood that by signing the waiver and speaking to Mr. Bennett he could be waiving the lawyer-client privilege as to all privileged communications between himself, Partington, and Partington's representative; that he understood that Partington had made statements that if he waived the privilege, Partington would disclose harmful information about Clarke; and he nevertheless said that he wanted to sign the waiver, and speak to Mr. Bennett. At this point, Mr. Bennett turned the tape recorder on, and conducted the interview with Clarke. I also participated.

6. I have reviewed a copy of the transcript of the May 1, 1990 deposition of Earle Partington. I do not believe that any question asked by Mr. Bennett called for the disclosure by Partington of any confidential communications not covered by Clarke's waiver.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Christopher Evans
CHRISTOPHER EVANS

Subscribed and sworn to before me
this 2nd day of May, 1990

/s/ Charlene S. Shimabukuro
Notary Public, State of Hawaii

My commission expires: 10/25/93

APPENDIX "L"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285
IN RE EARLE A. PARTINGTON	

FILED
1990 MAY 15 P 2:12
Eugene L Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the "Emergency Application and Motion to the Supreme Court for an Order Pursuant to Rule 37 of the Hawaii Rules of Civil Procedure" filed by the Rule 13 Prosecutor, and the papers in support and opposition thereto; the "Motion for Disqualification or Recusal of the Present Justices . . . and for Appointment of Substitute Justices to hear [the] 'Emergency Application and Motion . . . ' " filed by attorney Earle A. Partington; and the "Motion to Stay Rule 13 Proceeding" filed by counsel appointed to represent Clifford Clarke in Family Court,

IT IS HEREBY ORDERED:

The Motion for Disqualification or Recusal of Justices is denied, without prejudice to the filing of a timely motion upon submission of the Special Master's decision and order to this court.

The Emergency Application for an Order Pursuant to Rule 37 is denied. Under the facts of this case, attorney Partington having invoked the Fifth Amendment, this court declines to compel the answering of questions by Partington at the subject deposition or at the Rule 13 hearing. Nonetheless attorney Partington shall be afforded full opportunity to appear and present evidence and arguments on his behalf. The Special Master shall in due course render his decision and proposed order pursuant to Rule 13, based on the record and any relevant evidence and argument offered by the Rule 13 Prosecutor and Partington.

The Motion to Stay Rule 13 Proceeding is denied.

DATED: Honolulu, Hawaii, May 15, 1990.

FOR THE COURT:

/s/ H. Lum
Chief Justice
[seal]

APPENDIX "M"

NO. 10041
IN THE SUPREME COURT OF THE
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 First Circuit Court State of Hawaii MOTION FOR RECON- SIDERATION; Exhibit A
IN RE: EARLE A. PARTINGTON	

FILED
1990 MAY 16 PM 4:23
Sandra M. Yasvi
CLERK SUPREME COURT

MOTION FOR RECONSIDERATION*

Mark J. Bennett, the Rule 13 prosecutor, files this Motion for Reconsideration. This Court issued an order on May 15, 1990 denying the Emergency Application for an Order Pursuant to Rule 37, made by the Rule 13 prosecutor. This Court denied the application on the ground that attorney Earle Partington had invoked the Fifth Amendment as a ground for refusing to answer

*Cover, exhibits, affidavit, and certificates deleted in printing.

questions. The Rule 13 prosecutor believes that the Court was under the impression that attorney Partington invoked his Fifth Amendment privilege against self-incrimination. If that is what attorney Partington had done, then of course the Court was correct in denying the Application. However, the Rule 13 prosecutor believes such was not the case.

Throughout this proceeding, and in the federal court actions initiated by attorney Partington, it has been Partington's claim that this proceeding violated his right under the Fifth Amendment to the Constitution not to be "deprived of life, liberty, or property without due process of law." There has never been any claim by Partington that the proceeding violated his Fifth Amendment privilege against self-incrimination. For example, in Partington's Second Amended Complaint for Declaratory and Injunctive Relief in *Lau v. Lum*, Civil No. 89-00400 ACK, filed in the United States District Court for the District of Hawaii (attached as Exhibit A to this Motion), it is Partington's claim in paragraph 107 that the proceedings violate and deny him his right to due process of law under the Fifth Amendment to the United States Constitution. The Rule 13 prosecutor believes this is what Partington referred to when he talked of the invasion of his Fifth Amendment rights. Partington deposition at 4.

And, the attached Affidavit of the Rule 13 prosecutor establishes that Partington now admits that he was not invoking *his* Fifth Amendment self-incrimination privilege. Of course, the privilege is personal, and Partington may not invoke it on someone else's behalf, or on the ground that his testimony would implicate another. *See State v. Narvaez*, 68 Haw. 569, 573 (1986); *Rakas v. Illinois*,

439 U.S. 128, 140 n.8 (1978); *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *Rogers v. United States*, 340 U.S. 367 (1951).

The Rule 13 prosecutor requests this Court to reconsider its Order, and to consider the merits of the claims raised by the Rule 13 prosecutor. The Rule 13 prosecutor asks this Court to rule on the merits that Partington *must* answer all the questions asked of him by the Rule 13 prosecutor, unless he specifically states on the record that he is refusing to answer those questions pursuant to *his* Fifth Amendment privilege against self-incrimination.

With the record as it currently stands, Partington will be able to claim that this Court never adjudicated the question of the waiver of Clarke's lawyer-client privilege, and thus there was never a ruling that the privilege had been waived. Partington will likely claim that the Court misconstrued his Fifth Amendment argument, that he was never asserting his privilege against self-incrimination, and that in the absence of a court ruling that the lawyer-client privilege had been waived, he had no opportunity or right to "defend himself."

WHEREFORE, the Rule 13 prosecutor respectfully asks this Court to reconsider its Order of may 15, 1990.

DATED: Honolulu, Hawaii, May 16 1990

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

APPENDIX "N"

NO. 10041
IN THE SUPREME COURT OF THE
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285
IN RE: EARLE A. PARTINGTON	

FILED
1990 MAY 23 P 1:42
Eugene L. Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the Motion for Reconsideration filed by the Rule 13 Prosecutor,

IT IS HEREBY ORDERED that the motion is denied.

IT IS FURTHER ORDERED that attorney Partington's "Motion for Disqualification or Recusal of Justices . . . and for Appointment of Substitute Justices to Hear Mark J. Bennett's 'Motion for Reconsideration . . . '" is denied.

DATED: Honolulu, Hawaii, May 23, 1990.

FOR THE COURT:

/s/ H. Lum
Chief Justice

[seal]

APPENDIX "O"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, together with their successors in office, Defendants-Appellees.	NO. 87-2375 DC# CV-87-0172-ACK Hawaii ON EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION, AND FOR TEMPORARY RESTRAINING ORDER

[Filed April 30, 1990]

PLAINTIFF-APPELLEE'S MOTION FOR* IMPOSITION OF RULE 11 SANCTIONS

Plaintiff-Appellee Earle A. Partington pro se respectfully moves this Honorable Court for imposition of sanctions against Defendants-Appellees Gedan and Mark J. Bennett (as successor to Howard T. Chang) in their personal capacities for deliberate misrepresentations in their "State Official's Memorandum in Opposition to Plaintiff's Emergency Motions (Including Suggestion of

*Cover, declaration, exhibits and certificate deleted in printing.

Mootness Due to Waiver of Attorney Client Privilege)" dated April 26, 1990.

This motion is made pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27-1 and is abased upon Rule 11 of the Federal Rules of Civil Procedure as incorporated into Circuit Rule 1-1, the inherent power of the court, the attached Memorandum of Points and Authorities, the attached declaration of Earle A. Partington, exhibits A and B, and the record and file in this case.

DATED: Honolulu, Hawaii, April 28, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Plaintiff-Appellant pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, together with their successors in office, Defendants-Appellees.	)	NO. 87-2375 DC# CV-87-0172-ACK Hawaii ON EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION, AND FOR TEMPORARY RESTRAINING ORDER

MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF RULE 11 SANCTIONS AND IN REPLY TO DEFENDANTS-APPELLEES' OPPOSITION TO "EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION AND FOR TEMPORARY RESTRAINING ORDER"

I. REPLY TO DEFENDANTS-APPELLEES' OPPOSITION

Plaintiff-Appellant Partington moved this court to recall and clarify its mandate in order to determine the jurisdiction of the district court to hear a FRAP 60(b) motion and to determine the capacity in which the sanctions are to be awarded. In the same motion, Partington seeks a temporary restraining order to maintain the status quo. In response, Defendants-Appellees (hereinafter "Gedan and Bennett") are attempting to litigate the entire FRAP 60(b) motion in this court instead of in the district court where it belongs. Although Partington's emergency

motion requires some discussion of whether a TRO should issue, there is no justification for Gedan and Bennett burdening the court with the massive papers they submitted.[1] Gedan and Bennett fail to advance even one cogent reason why the mandate should not be recalled and clarified for the benefit of the district court.

A good portion of Gedan and Bennett's mootness arguments are also premised on serious factual misrepresentations contained in their "State Official's Memorandum in Opposition to Plaintiff's Emergency Motions (Including Suggestion of Mootness Due to Waiver of Attorney Client Privilege)" dated April 26, 1990 (hereinafter "SOL").

II. SUPPORT OF MOTION FOR IMPOSITION OF RULE 11 SANCTIONS

Serious misrepresentations by Gedan and Bennett in the SOL merit the imposition of sanctions by this court, for the following reasons.

A. Failure to disclose material facts.

Included in Exhibit 1 of the SOL is a purported waiver of the attorney-client privilege by Partington's former client Clarke in *State v. Clarke*. Gedan and Bennett

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[1] Defendants-Appellees' counsel, who signed the SOL, is the same counsel taken to task by this court in *Robinson v. Ariyoshi*, 854 F.2d 1189, 1190 (9th Cir. 1988), for conduct similar to that complained of here.

claim that the waiver moots significant parts of Partington's constitutional claims. Gedan and Bennett fail to tell the whole truth. A reading of the transcript included in Exhibit 1 of the SOL and Partington's declaration attached hereto shows that Clarke's present court-appointed attorney, Christopher R. Evans, together with Bennett, met with Clarke where he is incarcerated and had him sign a purported waiver of the attorney-client privilege as to his communications (during the trial in *State v. Clarke*) with Partington. In so acting, Evans abandoned his duty to Clarke and became an agent of Bennett, whose interests by no means coincide with those of Clarke.

Partington reported Evans' breach of duty to Clarke to the Office of Disciplinary Counsel of the Supreme Court of Hawaii as well as to the Criminal Administrative Judge of the Circuit Court of the First Circuit, State of Hawaii, who is responsible for the appointment of counsel for indigents accused of felonies here. No later than April 25, 1990, Bennett knew of these complaints by Partington.

It is undisputed that neither Clarke nor his attorney Evans knows what Partington would reveal if Clarke validly waives the attorney-client privilege. Evans failed to determine what Partington would say thereby rendering it impossible to disclose to Clarke what the consequences of Partington's disclosure might be. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Supreme Court stated:

> It has been point out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights."

Clearly then, there has been no valid waiver of the attorney-client privilege by Clarke.

Further, regardless of whether Clarke waive the privilege as to himself, Partington's duty to maintain the privilege remains unaffected. DR 4-101(C)(1) of the Hawaii Code of Professional Responsibility provides that a lawyer may reveal "[c]onfidences or secrets with the consent of the client or clients affected, but only after full disclosure to them." Therefore, Partington's revelation of Clarke's confidences without compliance with DR 4-101(C)(1) could subject Partington to discipline for breach of his duty to Clarke. Partington must be especially careful in this regard because Evans, in an affidavit dated March 10, 1987, for the instant case (see Exhibit A hereto (from ER 422-23)), instructed Partington on behalf of Clarke to invoke the attorney-client privilege.[2]

These facts and law were well known to Gedan and Bennett and to their counsel when they submitted their SOM on April 26, 1990. Yet no mention whatsoever is made of any of these matters. It is difficult, if not impossible, to believe their failure to disclose was other that intentional.

B. Misrepresentations of facts.

Gedan and Bennett claim (SOM at 35) that Partington has notice of the allegations against him in the purported

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[2] In the same affidavit, Evans represented that "Mr. Clarke is quite satisfied with the representation he received from [Partington]" and that Clarke "has no complaint against [Partington] for his handling of Clarke's first trial[.]"

HSCR 13 proceeding because Gedan drew Partington's attention to the specific allegations contained in the opinion of the Supreme Court of Hawaii in *State v. Clarke*. Further, they state (SOM at 45) that "Partington, since mandate has issued, has been provided greater specificity in the charges against him[.]"

However, as Gedan and Bennett and their counsel well know, Gedan ruled on April 18, 1990, at a prehearing conference in the purported HSCR proceeding, that there are *no* charges or allegations pending against Partington, and, indeed, that the purpose of the purported HSCR 13 proceeding was to determine at its conclusion whether charges are to be brought. Finally, the opinion of the Supreme Court of Hawaii in *State v. Clarke* contains no allegations. Instead, the opinion made specific *findings* against Partington without specifying any rule or law violated. Here again, Gedan and Bennett are attempting to mislead this court.

C. Misrepresentation of Partington's position.

Gedan and Bennett claim (SOM at 39) that "Partington virtually concedes that the Rule 13 action was not 'brought' in bad faith." As Partington stated on May 29, 1987, in a reply filed in the district court, he *did not know* why the proceeding was initiated against him and therefore could not say whether or not it was brought in bad faith. At no time has Partington ever conceded that the purported HSCR 13 proceeding was not brought in bad faith.

What makes this representation particularly egregious, is that on April 16, 1990, Partington filed a motion[3] for imposition of Rule 11 sanctions in the district court in this case for, *inter alia*, the identical misrepresentation. See Exhibit B hereto. For Gedan and Bennett to repeat this misrepresentation while a sanctions motion is pending in the district court of the identical misrepresentation is incredible.

CONCLUSION

Unfortunately, Defendant's-Appellees in this case have a history of making misrepresentations to the district court, this court, and the Supreme Court of the Untied States (see exhibits A and B within Exhibit B attached hereto). Such misrepresentations waste the court's time, as well as counsel's time and inhibit the administration of justice. The time has come to impose sanctions as a deterrence.

DATED: Honolulu, Hawaii, April 28, 1990.

/s/ Earle A. Partington
EARLE A PARTINGTON
Plaintiff-Appellant pro se

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[3] Inexplicably, this motion is missing from the two-and-a-half-inch thick stack of memorandum and exhibits that is the SOM.

APPENDIX "P"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, -vs- JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	No. 87-2375 D.C. No. CV-87-0172-KAY *ORDER DENYING MOTIONS* (Filed May 11, 1990)

Appeal from the United States District Court
for the District of Hawaii

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges.

Appellant's emergency motion to recall mandate, to amend the court's opinion, and for temporary restraining order is denied. Appellant's motion for imposition of rule 11 sanctions is also denied.

Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI; EXHIBIT A

PARTINGTON AND FOLEY
EARLE A. PARTINGTON
2450 PACIFIC TOWER
1001 BISHOP STREET
HONOLULU, HAWAII 96813
(808) 526-9500

Petitioner pro se

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a case involving the sixth amendment right-to-counsel clause, the Supreme Court stated that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. The burden of proof in establishing a valid waiver of the right to counsel falls upon the person claiming the waiver. Michigan v. Jackson, 475 U.S. 625, 633 (1986). The presumption against waiver applies to the attorney-client privilege, which is part of the sixth amendment right-to-counsel clause.

Respondents' suggestion of mootness rests entirely upon the validity of the purported attorney-client privilege signed by Partington's former client in State v. Clarke, Clifford M. M.

Clarke, Sr., on April 20, 1990. On May 29, 1990, subsequent to the filing of Petitioner's Motion to Strike Suggestion of Mootness and Respondent's Supplemental Memorandum and Memorandum in Opposition to Motion to Strike Suggestion of Mootness, Clarke, through his independent court-appointed counsel, filed a "Motion to Declare Waiver of Lawyer-Client Privilege Invalid and to Suppress Disclosures and for Remand for Hearing on Motion to Declare Waiver of Lawyer-Client Privilege Invalid and to Suppress Disclosures" in the Hawaii Supreme Court. A certified copy of Clarke's including his supporting affidavit, is appended as Exhibit A hereto. The motion is based on Clarke's assertion that he was advised by his prior court-appointed counsel, in the presence of HSCR 13 prosecutor Bennett (successor to respondent Chang), to waive the privilege, but was not afforded full disclosure prior thereto. Upon full disclosure of the consequences of such a waiver, Clarke asserts that he does not wish to waive the privilege and that if he had had full disclosure prior to the April 20, 1990, waiver, he would not have signed the waiver.

DATED: Honolulu, Hawaii, June 5, 1990.

EARLE A. PARTINGTON,
Petitioner pro se

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

FILED
1990 MAY 29 P 3:31
CLERK SUPREME COURT

MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES AND FOR REMAND FOR HEARING ON MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES

AFFIDAVIT OF PAUL T. MURAKAMI

AFFIDAVIT OF CLIFFORD M. M. CLARKE, SR.

PAUL T. MURAKAMI
Suite 716, Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
Tel. No. 531-6656

Attorney for Defendant-Appellant

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the State of Hawaii.

Dated, at Honolulu, Hawaii, June 5 A.D. 1990

Sandra N. Yasui
Clerk, Supreme Court, State of Hawaii

EXHIBIT A

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES AND FOR REMAND FOR HEARING ON MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES

Defendant-Appellant CLIFFORD M. M. CLARKE, SR., by and through his court-appointed attorney PAUL T. MURAKAMI, hereby moves for an order declaring the waiver of lawyer-client privilege filed in this proceeding on April 23, 1990, to be invalid, and to suppress disclosures made pursuant to said purported waiver. Defendant-Appellant moves that this matter be remanded to Circuit Court for an evidentiary hearing on this motion. This motion is based on the attached affidavits and the file in this case.

DATED: Honolulu, Hawaii, May 29, 1990.

Paul T. Murakami

PAUL T. MURAKAMI
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

AFFIDAVIT OF PAUL T. MURAKAMI

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

PAUL T. MURAKAMI, being first duly sworn upon oath, deposes and says:

That he is personally familiar with the facts stated herein.

That he has been appointed by Judge Huddy, Administrative Judge of the Criminal Division, First Circuit Court, to represent Defendant-Appellant "for the limited purpose of consulting with Defendant as to whether or not he should waive his attorney-client privilege in the Rule 13 proceeding (S. Ct. No. 10041) associated with this case [Cr. No. 59285]."

That Affiant's "appointment includes the taking of any actions he feels necessary in this Court [Circuit

Court], in the Supreme Court of Hawaii or in any other court in connection with his consultation with Defendant for the protections of Defendant's interests."

That Affiant was appointed by Judge Huddy based on the motion made by Defendant-Appellant's Family Court attorney, SAMUEL P. KING, JR., who was concerned that Defendant-Appellant had not been fully advised about the consequences of waiving his attorney-client privilege.

That Affiant consulted with Defendant-Appellant personally at Kulani Correctional Facility on the island of Hawaii and by phone several times.

That Affiant learned in his first meeting with Defendant-Appellant that he had purportedly waived his attorney-client privilege at the suggestion of his criminal defense attorney, CHRITOPHER R. EVANS, without having been informed by Mr. Evans as to what Mr. Partington might say if the privilege were waived, and that Affaint believed that this was inappropriate since DR 4-101(C)(1) requires a "full disclosure" to a client before obtaining consent of a client validly to waive the attorney-client privilege.

That in order to obtain sufficient information to make a "full disclosure" to Defendant-Appellant about the effect of his waiving his attorney-client privilege, Affiant obtained the permission of Defendant-Appellant

to talk to Mr. Partington to find out what Mr. Partington whould say if the privilege were waived.

That Affiant talked to Mr. Partington and was informed what he would say if the privilege were waived and Affiant reported this information back to Defendant-Appellant.

That upon consultation with Defendant-Appellant after "full disclosure" to him about all of the ramifications of waiving his attorney-client privilege, Defendant-Appellant has decided that, now that he has "full disclosure," he does not want to waive his attorney-client privilege in this matter and that he wants to have his previously filed waiver declared invalid.

That Defendant-Appellant feels that he did not obtain "full disclosure" when he purportedly waived his privilege and that if he had obtained "full disclosure" when the issue of waiver was first presented to him, he would not have purported to waive his privilege.

That based on what Affiant has learned from Mr. Partington, Mr. King and the file in this case, Affiant agrees with Defendant-Appellant that he did not receive proper "full disclosure" when he first waived his attorney-client privilege, and that Defendant-Appellant's remedy is now to move in this Court to have his purported waiver declared invalid and his statement taken

thereunder suppressed following an evidentiary hearing in Circuit Court.

That Affiant believes that a remand to Circuit Court for an evidentiary hearing on the issues involved is necessary because this Court does not hold evidentiary hearings.

That Affiant believes that it is in Defendant-Appellant's best interests that his purported waiver be declared invalid and that all disclosures made by Defendant-Appellant thereunder be suppressed and that these remedies are mandated by the fact that Defendant-Appellant filed his purported waiver and made his disclosures without having been fully and competently advised of the effect of his purported waiver and disclosures.

Further Affiant sayeth naught.

Paul T. Murakami
PAUL T. MURAKAMI

Subscribed and sworn before me on this
29th day of May, 1990.

Bobbie J. Hayes
Notary Public, State of Hawaii

My commission expires: 8/4/92

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	Cr. No. 59285
In re EARLE A. PARTINGTON	

AFFIDAVIT OF CLIFFORD M. M. CLARKE, SR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

CLIFFORD M. M. CLARKE, SR., being first duly sworn upon oath, deposes and says:

That he is personally familiar with the facts stated herein.

That he is the Defendant-Appellant in the above case.

That on April 20, 1990, Affiant was approached by his criminal defense attorney, Christopher Evans, and Mark Bennett, whom he did not know and had never met and was introduced to him by Mr. Evans.

That on April 20, 1990, in the presence of Mr. Bennett, Mr. Evans advised Affiant to waive his attorney-client privilege as to all communications between

him and attorney Earle A. Partington who represented Affiant is his first trial and appeal.

That when Mr. Evans advised me to waive my privilege, Affiant did not know what Mr. Partington would say if Affiant's privilege were waived, and neither did Mr. Evans as Affiant has never authorized Mr. Partington to tell Mr. Evans what Mr. Partington would say and Mr. Evans has never asked Affiant to authorize Mr. Partington to tell Mr. Evans what Mr. Partington would say.

That Mr. Evans informed Affiant that it was in his best interests to waive his privilege as to Mr. Partington, and that by waiving the privilege, Affiant would be able to stay out of the Rule 13 proceeding involving Mr. Partington.

That it has always been Affiant's desire to have no involvement in this Rule 13 proceeding, and that Affiant has always told Mr. Partington and Mr. Evans this.

That based upon Mr. Evans' representations that it would be in Affiant's best interests to waive the privilege and that Affiant would not be further involved in this proceeding, and only for these reasons, Affiant signed the waiver that Mr. Evans had brought with him and spoke to Mr. Evans and Mr. Bennett about my first trial, including my commnications with Earle A. Partington.

That upon being advised by Affiant's Family Court attorney, Samuel P. King, Jr., that he had serious questions about the advisability of waiving the privilege, Affiant authorized Earle A. Partington to reveal to Mr. King what Mr. Partington would say if the attorney-client privilege were waived.

That after Mr. King spoke to Mr. Partington and reported back to Affiant, Affiant became concerned about the advisability of waiving his privilege and asked that an independent attorney be appointed to advise him in this matter.

That after Paul T. Murakami was appointed to advise Affiant in this matter, Affiant authorized Earle A. Partington to reveal to Paul Murakamai what Mr. Partington would say if Affiant waived the attorney-client privilege..

That after being advised by both Mr. King and Mr. Murakami, Affiant believes that it is not now nor has it ever been in his interest to waive his attorney-client privilege and that had he known on April 20, 1990, what Mr. Partington would say, and that a waiver of the privilege would involve Affiant in the Rule 13 proceeding against his wishes, he never would have signed the purported waiver.

That Affiant has read the motion and affidavit filed herewith and is in full support of Mr. Murakami's efforts to assist him in asserting his attorney-client privilege.

Further Affiant sayeth naught.

Clifford M. M. Clarke Sr.
Clifford M. M. Clarke Sr.
CLIFFORD M. M. CLARKE, SR.

Subscribed and sworn before me on this
25th day of May, 1990.

Mary Virginia Davis
Notary Public, State of Hawaii

My commission expires: 03/24/91

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered or mailed to following persons as specified on May 29, 1990:

JOSPEH M. GEDAN
3703 Round Top Drive
Honolulu, Hawaii 96822

MARK BENNETT
McCorriston, Miho & Miller
500 Ala Moana, Suite 400
Honolulu, Hawaii 96813

EARLE A. PARTINGTON
Pacific Tower, Suite 2450
1001 Bishop Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, May 29, 1990.

Paul T. Murakami

PAUL T. MURAKAMI
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following person(s) on June 5, 1990, to the address below by:

(X) HAND-DELIVER

( ) MAIL

TO: STEVEN S. MICHAELS
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Attorney for Defendants

JOHN ASHFORD THOMPSON
Suite 600
810 Richards Street
Honolulu, Hawaii 96813

Attorney for Amicus Curiae Hawaii
Association of Criminal Defense Lawyers

EARLE A. PARTINGTON